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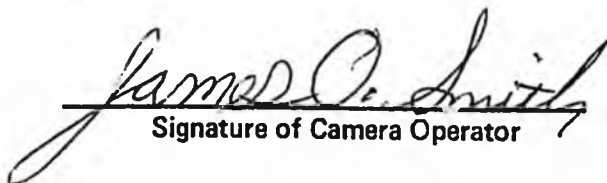
3921 SHEB SB 72 - SB 80

266



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Senate Health, Education and Social Services Committee

Legislation Checklist

Bill number: *SB 72*

Sponsor: *ABOOD*

Date referred to committee: *1/22/85*

Synopsis completed: *1/28*

Fiscal note:

Further referrals: *Judiciary, Finance*

CONTACTS:

✓ *Karla Forsythe, Courts - call if scheduled. She has concerns.* *in journal 2/12* *264-0634*

✓ *Sen Abood 4747 Catherine*

✓ *Dana Fabe, Public Defender 279-7541* *(in JNU 2/13, 14)*
TOM NAVE IN JNU.

✓ *George Edwards, Legal 2450*

✓ *Cindy Nelson, Corrections 3376*

✓ *Paul Conger, Public Safety ~~4338~~ 4338*

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907.465.3800

LEGISLATIVE AFFAIRS AGENCY
LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

HESS

2-19-85

1:33 pm

Rule 39. Appointment of Counsel.

(a) **Informing Defendant of Right to Counsel.** If the defendant appears for arraignment or trial without counsel, the court shall advise him of his right to have counsel, and shall ask him if he desires the aid of counsel.

(b) **Appointment of Counsel for Persons Financially Unable to Employ Counsel.**

(1) If

(i) the defendant states that

(aa) he desires the aid of counsel, and

(bb) he is financially unable to employ counsel, and

(ii) the court determines after inquiring of the defendant under oath as to his financial status that he is an "indigent person" as defined by statute, then the defendant is entitled to have counsel provided at public expense, and the court shall immediately notify the Alaska Public Defender Agency that the Agency has been appointed to represent the defendant and immediately appoint the Public Defender to represent the defendant. As a condition of receiving the services of counsel at public expense, the defendant shall execute a general waiver authorizing release of income information to the court as required by statute.

(2) If the Agency has a conflict or is otherwise unable to represent the defendant, the court shall appoint counsel to represent him pursuant to statute.

(3) In the absence of a request by a defendant, otherwise entitled to appointment of counsel, the court shall appoint counsel for him unless he demonstrates that he understands the benefits of counsel and knowingly waives the same.

(4) The court, in its discretion, may appoint counsel in any case in which appointment best serves the interest of justice.

(c) **Ability of Defendant to Pay Cost of Counsel—Determination by Court—Order—Execution.**

(1) In any case in which the defendant is furnished counsel, either through the Public Defender Agency or private counsel appointed by the court, upon or prior to the conclusion of the criminal proceedings in the trial court, the court may, after a hearing, make a determination of the defendant's present

ability to pay all or a portion of the cost of representation.

(2) At the hearing, the defendant shall be entitled to have, but shall not be limited to

- (i) the opportunity to be heard in person,
- (ii) to present witnesses and other documentary evidence,
- (iii) to confront and cross-examine adverse witnesses,

and

(iv) disclosure of the evidence against him pertaining to his ability to pay for representation.

(3) If the court, after the hearing, determines that the defendant has the present ability to pay all or part of the cost, it may order payment of the sum to the state general fund in any instruments and in a manner which it believes reasonable and compatible with the defendant's financial ability. The court shall file written findings, a copy of which shall be provided to the defendant. No default or failure in the making of any such payment shall in any way affect or reduce the rendering of services on appeal or any other phase of the defendant's case. The order shall not be enforceable by contempt. Execution on the order is to be made by the attorney general, in the same manner as on a judgment in a civil action.

(4) The cost of services of counsel shall be calculated at the hourly rate provided in Administrative Rule 12(f). At the hearing, counsel for the defendant shall provide evidence of:

- (i) the hours he or she has expended to date;
- (ii) an estimate of the hours, if any, still required to be expended on behalf of the defendant; and

(iii) any costs and expenses that are expected to be incurred or that have actually been incurred by private counsel or by the Public Defender Agency, including a reasonable estimate of the cost to the Public Defender Agency of any services provided on behalf of the defendant by investigators employed by the Public Defender Agency. Reimbursement for costs and expenses incurred by private counsel shall not exceed \$250.00 unless authorization was obtained in advance in accordance with paragraphs (g) and (h) of Administrative Rule 12.

(5) Prior to the furnishing of counsel in the trial court, the court shall give notice to the defendant that the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of representa-

tion. The court shall also give notice that, if the court determines that the defendant has such present ability, the court may order him to pay all or part of such cost. The notice shall inform the defendant that the order shall have the same force and effect as a judgment in a civil action and shall be subject to execution.

(6) In making a determination of the defendant's present ability to pay all or a portion of the cost of representation, the court shall take into account the defendant's current income, assets and obligations, including necessary living expenses of the defendant and his dependents, if any. The defendant may not be required to pay any amount, or to liquidate any property that would be exempt from execution by law.

(7) The court may refer matters under section (c) of this rule to a master. (Amended by Supreme Court Order 157 effective February 15, 1973; by Amendment No. 4 to Supreme Court Order 157 dated March 12, 1973; by Supreme Court Order 187 effective July 2, 1974; by Supreme Court Order 328 effective January 1, 1979; and by Supreme Court Order 449 effective November 24, 1980)

(b) **CROSS REFERENCE:** Crim. Forms 51, 52

SB 72

Current statute (AS 12.80.030) prohibits the courts from ordering a defendant to pay court costs. Section 3 of SB 72 would authorize the courts to order a defendant to pay costs of defense attorneys, expenses of prosecution, and other court costs.

Section 2 would require that suspended impositions of sentence be considered as prior convictions for purposes of presumptive sentencing for class A felonies, class B felonies, sexual assault in the first degree, and sexual abuse of a minor in the first degree. Under current statute (AS 12.55.085), suspended impositions of sentence are granted at the court's discretion when there are circumstances in mitigation of the punishment. During the period of suspension the person is placed on probation, and upon satisfactory completion of probation the conviction is set aside and not considered for purposes of presumptive sentencing.

SB 94

SB 94 would increase the state excise tax on cigarettes by 4 mills. Current statute provides for a 4 mill tax, with 2.5 mills dedicated (under Article IX, Section 7 of the Alaska Constitution) to the school fund (for rehabilitation, construction, and repair of school facilities). Other proceeds go to the general fund.

Barring congressional action, the federal excise tax will be reduced by 4 mills effective October 1, 1985.

SB 98

Like SB 72, SB 98 addresses the issue of prior convictions. Under Section 2, suspended imposition of sentence would be considered a prior conviction not only for purposes of presumptive sentencing, but, also as a factor in aggravation, parole, and certain licensing proceedings.

Section 3 allows a pardoned conviction to be considered in aggravation, parole, and licensing, but not for purposes of presumptive sentencing unless provided for in the pardon.

SB 98 also addresses the expunction of records in light of the proposed subsequent uses for a prior conviction.

file SB 72

Alaska State Legislature



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CHAIRMAN
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MEMBER
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TRANSPORTATION

Senator Mitch Abood
SENATE DISTRICT G-A

MEMORANDUM

TO: Senator Fahrkamp, Chairman
Committee on Health, Education and
Social Services

FROM: Senator Abood *M.A.*

RE: SB 72 - "An Act relating to sentencing."

DATE: January 31, 1985

Please find attached information pertaining to SB 72, "An Act relating to sentencing."

This bill is one of five which I have sponsored to further refine the State's DWI policy. I would appreciate your earliest possible consideration of this bill in your committee.

If I can be of further help, please do not hesitate to call.

Thank you for your cooperation in this matter.

SENATE BILL 72

"An Act relating to sentencing."

Section 1

Permits a sentencing court to require that a defendant pay some or all of the cost of a criminal action.

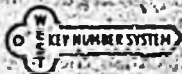
Section 2

Removes an apparent contradiction from the law. If a court suspends imposition of sentence in a felony, and the defendant complies with the terms of the probation, the conviction is then removed from his or her record by what is called an "order of closure and discharge." Despite the fact that certain felonies carry presumptively enhanced sentences where there is a prior felony on the defendant's record, these vacated sentences may not be used as "prior offenses" for this purpose, according to the Alaska Court of Appeals (Larson v. State, Court of Appeals opinion no. 403, 9/14/84). So, despite the Legislature's intent that persons who commit more than one felony serve a longer sentence on the second conviction, the trial court is not bound to give such defendants more than first-offense sentences.

Section 3

LMRA actions, state courts had jurisdiction over such actions by trustees. See *Vermeer v. Tomljen Construction, Inc.*, 49 Or.App. 37, 613 P.2d 1301 (1980); *Trust Fund Services v. Heyman*, 88 Wash.2d 698, 565 P.2d 805 (1977), cert. denied, 434 U.S. 987, 98 S.Ct. 618, 54 L.Ed.2d 463 (1977); cf. *Smith v. Evening News Association*, 371 U.S. 195, 83 S.Ct. 267, 9 L.Ed.2d 246 (1962) (suit by employees).

REVERSED.



Larry O. LARSON, Appellant,

STATE of Alaska, Appellee.

No. 6179.

Court of Appeals of Alaska.

Sept. 14, 1984.

Defendant was convicted before the Superior Court, Third Judicial District, Anchorage, Ralph E. Moody, J., of burglary in the first degree, robbery in the first degree and assault in the second degree, and he appealed. The Court of Appeals, 656 P.2d 571 affirmed. The Superior Court sentenced defendant to consecutive sentences of ten years for burglary, 20 years for robbery, and ten years for assault for total sentence of 40 years, and made 40-year sentence consecutive to previously imposed eight-year sentence for shooting with intent to wound, and defendant appealed his total sentence, contending that it was excessive. The Court of Appeals, Singleton, J., held that: (1) a conviction that has been set aside following suspended imposition of sentence is not a prior conviction for purposes of presumptive sentencing, and defendant therefore should have been treated as a second felony offender rather than a third felony offender; (2) defendant's adult

robbery conviction, although set aside, could be considered along with shooting with intent to wound conviction as part of pattern of prior convictions for offenses involving aggravated or repeated instances of assaultive behavior; (3) trial judge's findings with regard to aggravating factors were not clearly erroneous; (4) trial court was justified in designing sentence for defendant that would reflect importance of isolating him from society; but (5) sentences imposed should not be made consecutive to his prior conviction for shooting with intent to wound.

Judgment affirmed in part and reversed in part; sentence vacated and case remanded for resentencing.

1. Criminal Law \S 1202.16

A conviction that has been set aside following suspended imposition of sentence is not a prior conviction for purposes of presumptive sentencing, and thus defendant, whose 1972 armed robbery conviction was set aside, should have been treated as a second rather than a third felony offender. AS 12.55.085(e), 12.55.145.

2. Criminal Law \S 986.2(4)

Conviction vacated following suspended imposition of sentence may be used, when appropriate, to support finding of criminal history for offenses that involve aggravated or repeated instances of assaultive behavior. AS 12.55.085(e), 12.55.155(c)(8).

3. Criminal Law \S 986.2(4)

Legislative extension of statutory aggravation provision to situations where defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior merely clarified existing law and thus trial court could properly consider defendant's adult robbery conviction, even though it was set aside following suspended imposition of sentence, together with shooting with intent to wound conviction as part of pattern of behavior involving aggravated or re-

peated instances of AS 12.55.085(e), 12.55.

4. Criminal Law \S 99

Once it was established that defendant had two prior adult convictions for aggravated factor, appellate court could consider prior convictions in deciding how much sentencing factor. AS 12.

5. Criminal Law \S 11

Findings of sentence used same aggravating factors as evidence for each offense used factors to justify sentence that were imposed, conviction clearly erroneous since involved conduct which among the most serious since when additional factors applied independently to each offense considered, each offense would merit maximum sentence. AS 12.55.155(c)(8), 10, 12).

6. Criminal Law \S 121

Finding that defendant will warrant imposition of consecutive sentences exceeding 10 years is the most serious count and will not automatically vacate consecutive sentences of 10 years if sentence must still be considered for purposes of rehabilitation, deterrence, isolation and affirmative norms.

7. Criminal Law \S 1208

Isolation as predominate criterion should be reserved for habitual criminals who are not rehabilitated nor deterred and therefore be incarcerated for a period of maximum sentence for a serious offense.

8. Criminal Law \S 1208

Trial court was justified in imposing sentence for defendant, with consideration of prior convictions for crimes of

* Cranston, Superior Court Judgment, assignment made pursuant to

peated instances of assaultive behavior. AS 12.55.085(e), 12.55.155(c)(8).

4. Criminal Law \S 986.2(5)

Once it was established that defendant had two prior adult convictions making aggravating factor applicable, trial court could consider prior juvenile adjudications in deciding how much weight to give sentencing factor. AS 12.55.155(c)(8)

5. Criminal Law \S 1158(1)

Findings of sentencing judge, who used same aggravating factors based on same evidence for each offense and then used factors to justify maximum sentences that were imposed consecutively, were not clearly erroneous since each offense involved conduct which could be considered among the most serious within its class and since when additional aggravating factors, applied independently to each offense, were considered, each offense permitted a maximum sentence. AS 12.30.020, 12.30.040, 12.55.155(c)(8, 10, 12).

6. Criminal Law \S 1210(3)

Finding that defendant is a worst offender will warrant imposition of consecutive sentences exceeding maximum for single most serious count but such a finding will not automatically justify maximum consecutive sentences on all counts; total sentence must still be considered on basis of rehabilitation, deterrence of self and others, isolation and affirmation of community norms.

7. Criminal Law \S 1208.1(1)

Isolation as predominant sentencing criterion should be reserved for dangerous or habitual criminals who can be neither rehabilitated nor deterred and who must therefore be incarcerated for period in excess of maximum sentence for their most serious offense.

8. Criminal Law \S 1208.1(1)

Trial court was justified in designing sentence for defendant, who had number of convictions for crimes of violence and who

* Cranston, Superior Court Judge, sitting by assignment made pursuant to article IV, section

had served substantially more than one year of continuous incarceration prior to committing crimes, that reflected importance of isolating him from society. AS 11.41.500(a)(1), 11.46.300(a)(1).

9. Assault and Battery \S 100

Burglary \S 49

Criminal Law \S 1184(4)

Robbery \S 30

Defendant's potential total incarceration of 40 years for burglary in the first degree, robbery in the first degree and assault in the second degree was not clearly mistaken, but since nothing supported finding that term of 40 years would not adequately protect the public, sentences imposed for those crimes could not be made consecutive to his prior conviction for shooting with intent to wound. AS 11.15.150, 11.46.300(a)(1), 11.41.500(a)(1); AS 11.15.150 (Repealed).

Susan Orlansky, Asst. Public Defender, and Dana Fabe, Public Defender, Anchorage, for appellant.

Rhonda F. Butterfield, Asst. Atty. Gen., Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., SINGLETON, J., and CRANSTON, Superior Court Judge.*

OPINION

SINGLETON, Judge.

Larry Larson and Richard Buza broke into a home and assaulted and robbed the occupants. As a result, Larson was convicted of burglary in the first degree, AS 11.46.300(a)(1), robbery in the first degree, AS 11.41.500(a)(1), and assault in the second degree, AS 11.41.210(a)(1). Larson's conviction was affirmed in *Larson v. State*, 656 P.2d 571 (Alaska App.1982) (*Larson II*). Larson received consecutive sentences of ten years for the burglary, twenty years for the robbery, and ten years for the

assault, for a total sentence of forty years. This forty-year sentence was made consecutive to a previously imposed eight-year sentence for shooting with intent to wound, former AS 11.15.150.¹ Larson appeals his total sentence, contending that it is excessive. Specifically, he argues that the trial court erred (1) in treating him as a third felony offender, (2) in applying the same aggravating factors to increase the presumptive sentence for each offense, and, (3) in imposing sentences that are consecutive both to each other and to the previously imposed eight-year term. We affirm in part and reverse in part. We conclude that Larson should not have been treated as a third felony offender and that the record does not support a sentence of more than forty years' imprisonment. If the same sentences are imposed on remand, they should not be made consecutive to the eight-year sentence previously imposed on Larson. In all other respects we affirm the judgment of the superior court.

THE OFFENDER

Larry Larson was twenty-eight years of age on July 9, 1980, when the instant offenses were committed. He left school at the age of fifteen, but subsequently acquired his G.E.D. degree; he has taken a number of college courses while incarcerated. Larson is of above-average intelligence and readily found employment when he sought it. The record reflects that he is a conscientious worker within and outside of prison. He received commendations for his work as a prison cook and prison law librarian. Larson is not suffering from a major mental illness. However, he apparently has an alcohol problem.

Mr. Larson's good qualities, his intelligence and industriousness, are counterbalanced by an extensive criminal record. In 1968, at the age of sixteen, Larson was

1. Larson was appealing his conviction for shooting with intent to wound at the time he committed the instant offenses. His conviction was affirmed by the Alaska Supreme Court in *Larson v. State*, 614 P.2d 776 (Alaska 1980) (*Larson I*).

adjudicated a delinquent based on three incidents, each of which would have been a felony had he been an adult. One of those offenses was the armed robbery of a fifty-four-year-old man who had given Larson and his brother a ride.² Larson spent time in juvenile institutions for these offenses.

Four years later, in July of 1972, Larson was sentenced as an adult for an armed robbery of a cab driver under circumstances similar to his juvenile offense. Larson received a five-year suspended imposition of sentence. In August of 1975, shortly before his conviction was set aside for the 1971 robbery, Larson shot and wounded an innocent bystander during a barroom fight. He was convicted of shooting with intent to wound and received an eight-year sentence with no parole eligibility until he served one-third of his sentence. See *Larson I*, 614 P.2d at 777. Larson remained in prison on this charge from December 19, 1975 until June 10, 1980 when he was released on bail pending appeal. As a condition of release, Larson entered the Clitheroe alcohol treatment center. Larson remained at the Clitheroe Center until July 9, 1980, when he was reported AWOL. The instant offenses occurred that night.

THE OFFENSES

On July 9, 1980, at approximately 3:30 a.m., D.S. and his wife, M.S., had been sleeping when D.S. heard a commotion on the porch and decided to investigate. In the course of his investigation, D.S. opened the door; Larson and Buza accosted him at gunpoint and forced their way into the apartment. It appears that Larson and Buza mistakenly believed that the S. family were cocaine dealers and had a large supply of cocaine or money in the apartment. The S.'s indicated that they had no cocaine. Buza demanded all their money and took

2. Larson and his brother persuaded the victim to drive to a remote area. Once the vehicle was stopped, the brothers both pulled out sheath knives, took fifteen dollars from the victim, tied his hands, and blindfolded him. Apparently Larson held a rifle on the victim at some point during the robbery.

the ten dollars that D.S. had on him at the time Larson led M.S. to the bathroom where he forced her to lie on the floor and spread her legs. He pointed the barrel of the rifle up at her. M.S. pled with Larson not to shoot her as she was hemorrhaging from a wound recently given birth to a

D.S. was also forced to lie on the floor with his legs spread apart and was kicked in the groin several times. During the course of the robbery, the victims' puppy was shot. When it became clear that the dog was neither cocaine nor addictive, Larson left. They were immediately apprehended and the dog was found abandoned in *Larson II*, 656 P.2d at 572-73.

THE SENTENCE

The trial court made findings of fact and entered conclusions of law:

The court having considered the evidence and the arguments made by the parties, makes the following findings:

As to Count I [Burglary]

1. The defendant has a criminal record consisting of prior convictions for offenses that involved repeated instances of assault.
2. The conduct constituted burglary was among the most serious offenses included in the definition of burglary.
3. The defendant was convicted of burglary under AS 12.30.020 or AS 12.30.020 felony conviction.

As to Count II [Robbery]

1. The defendant has a criminal record consisting of prior convictions for offenses that involved repeated instances of assault.
2. The defendant knew the victim involved more than one person.
3. The conduct constituted robbery was among the most serious offenses included in the definition of robbery.
4. The defendant was convicted of robbery under AS 12.30.020 or AS 12.30.020 felony conviction.

delinquent based on three which would have been a an adult. One of those armed robbery of a fifty-n who had given Larson ride.² Larson spent time tutions for these offenses.

er, in July of 1972, Larson s an adult for an armed driver under circumstance juvenile offense. Larson ear suspended imposition August of 1975, shortly tion was set aside for the rson shot and wounded an er during a barroom fight. of shooting with intent ed an eight-year sentence eligibility until he served sentence. See *Larson I*, Larson remained in prison from December 19, 1975 80 when he was released appeal. As a condition of ntered the Clitheroe alco- ter. Larson remained at nter until July 9, 1980, orted AWOL. The instant l that night.

OFFENSES

0, at approximately 3:30 is wife, M.S., had been S. heard a commotion on cided to investigate. In investigation, D.S. opened and Buza accosted him at rced their way into the ppears that Larson and believed that the S. family ers and had a large sup- money in the apartment. that they had no cocaine. ll their money and took rother persuaded the victim e area. Once the vehicle was ners both pulled out sheath d dollars from the victim, tied lindfolded him. Apparently on the victim at some point

Cite as 688 P.2d 592 (Alaska App. 1984)

the ten dollars that D.S. had. In the mean- time Larson led M.S. into the bedroom where he forced her to lay down on her bed and spread her legs. He then jammed the barrel of the rifle up against her anus. M.S. pled with Larson not to assault her as she was hemorrhaging due to having recently given birth to her second child.

D.S. was also forced to lie on the ground with his legs spread apart while he was kicked in the groin several times by Buza. During the course of the burglary/robbery, the victims' puppy was stomped to death. When it became clear that the S.'s had neither cocaine nor additional money, Buza and Larson left. They were almost immediately apprehended and their weapons were found abandoned nearby. See *Larson II*, 656 P.2d at 572-73.

THE SENTENCE

The trial court made the following findings of fact and entered the following conclusions of law:

The court having considered the evidence and the arguments of counsel makes the following findings of fact:

As to Count I [Burglary]:

1. The defendant has a criminal history consisting of prior convictions for offenses that involved aggravated or repeated instances of assaultive behavior.
2. The conduct constituting the offense was among the most serious conduct included in the definition of the offense.
3. The defendant was on release under AS 12.30.020 or AS 12.30.040 for another felony conviction.

As to Count II [Robbery]:

1. The defendant has a criminal history consisting of prior convictions for offenses that involved aggravated or repeated instances of assaultive behavior.
2. The defendant knew that the offense involved more than one victim.
3. The conduct constituting the offense was among the most serious conduct included in the definition of the offense.
4. The defendant was on release under AS 12.30.020 or AS 12.30.040 for another felony conviction.

As to Count IV [Assault]:

1. The defendant's conduct during the commission of the offense manifested deliberate cruelty to [M.S.].
2. The defendant has a criminal history consisting of prior convictions for offenses that involved aggravated or repeated instances of assaultive behavior.
3. The conduct constituting the offense was among the most serious conduct included in the definition of the offense.
4. The defendant was on release under AS 12.30.020 or AS 12.30.040 for another felony conviction.

Having found the above aggravating factors by clear and convincing evidence and that there are no mitigating factors, this court finds that under the *Chaney* criteria the defendant is not amenable to rehabilitation and should be isolated from society. Further that the sentence imposed must act as a deterrent to others and must serve to reaffirm societal norms.

This court further finds that confinement of the defendant for the aggregate period of incarceration imposed by this court is necessary to protect the public and justifies the imposition of consecutive presumptive terms which result in an aggregate sentence that exceeds the presumptive term for a single count.

This court finds further that the manner in which these crimes were committed and the character and background of the defendant make the defendant a "worst offender".

The trial court then imposed a total sentence of forty years consecutive to the eight-year sentence previously imposed upon Larson for shooting with intent to wound.

DISCUSSION

I.

[1] Larson complains that he was improperly treated as a third felony offender. He argues that the trial court should not have considered his 1972 armed robbery

to reward a defendant who is innocent to his conviction and leads a blameless life. Expunging and setting aside the conviction ensure that a defendant will be treated in his later law-abiding life without lateral consequences flowing from his conviction. In the instant case, the trial court apparently reasoned that it should not reform during his period following the suspended sentence for his robbery conviction. Larson was convicted of a felony of shooting with intent to kill in 1976, two and one-half years before the instant conviction. Judge Moody set aside Larson's conviction. When Judge Moody was aware of this sequence of events, he purported to vacate Larson's prior conviction. Judge Moody said that he set aside the conviction had he been aware of the intervening felony conviction. Larson appeared and we reviewed the court's decision in an unpublished opinion. Essentially, we held that there is no rule which permits a court to amend a judgment or order adverse to a criminal defendant at order or judgment befalling the defendant. See *Shagloak v. State*, 582 P.2d 100 (Alaska, 1978).

Memorandum Opinion and Order, 240 P.2d at 3-4 (Alaska App., 1952).

also said:

Our decision should be controlling in deciding the question of whether a defendant is subject to presumptive sentencing where he has previously been convicted of a felony but imposition of a sentence is deferred and defendant's conviction is later expunged. We do not discuss the issue properly before us at this time. [at 4.]

vacated Judge Moody's order vacating Larson's 1972 conviction, we consider the conviction as a conviction for sentencing Larson for the

instant offenses. On appeal, the state concedes error and argues that the trial court should not have considered Larson's robbery conviction as a prior felony. Despite the state's concession of error, we must independently consider the issue. *Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972). As the state points out, every jurisdiction that has considered the issue has ruled in Larson's favor. See, e.g., *People v. Wunnenberg*, 85 Ill.2d 188, 52 Ill.Dec. 42, 421 N.E.2d 905, 908 (1981); *People v. Calvert*, 100 Ill.App.3d 510, 55 Ill.Dec. 844, 426 N.E.2d 1218 (1981); *Smith v. State*, 50 Md.App. 638, 440 A.2d 406, 408 (1982); *People v. Garcia*, 93 Misc.2d 667, 402 N.Y.S.2d 164 (N.Y. Sup. 1978); *Garcia v. State*, 625 S.W.2d 831, 835 (Tex. App. 1981). In the absence of some indication in the statute or its legislative history suggesting a contrary result, we agree with the state that we should give our statute a similar interpretation. We therefore hold that a conviction that has been set aside pursuant to AS 12.55.085(e) is not a prior conviction for purposes of presumptive sentencing. See AS 12.55.145. Larson should have been treated as a second felony offender.

II

Larson argues that the trial court erred in finding the same aggravating factors based on the same evidence for each of his offenses, and then using those factors to justify maximum sentences which were imposed consecutively. We will first address Larson's objections to the specific aggravating factors found by the court. We will then consider Larson's argument that the same factors could not be used to aggravate each of his convictions.

Larson first argues that the trial court erred in finding that he had a criminal history consisting of prior convictions for offenses that involved aggravated or repeated instances of assaultive behavior. See AS 12.55.155(c)(8). Although Larson concedes that his shooting with intent to wound conviction qualifies as a prior conviction for assaultive behavior, he reasons that the aggravating factor requires two or

more convictions. Larson admits that he was previously convicted twice of robbery, once as an adult and once as a juvenile. However, he reasons that the adult robbery conviction was set aside and therefore cannot be considered, and that juvenile adjudications do not qualify as convictions.

[2] We have previously held that Larson's adult robbery conviction, having been set aside, could not be considered a prior conviction for purposes of triggering presumptive sentencing. However, this conclusion does not preclude using vacated convictions where appropriate to support a finding under AS 12.55.155(c)(8). As originally enacted, that provision established an aggravating factor where "the defendant has a criminal history consisting of prior convictions for offenses, including misdemeanors, that involved aggravated or repeated instances of assaultive behavior." It was subsequently expanded, after Larson committed the offenses at issue, to extend to situations where "the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior." In addition, as Larson points out, the legislature has added an aggravating factor where "the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult." AS 12.55.155(c)(19).

[3] Larson reasons that these amendments to the statute constitute changes that should not be applied retroactively. We need not decide whether aggravating factors may be given retroactive application, however, because we do not view the legislative change to AS 12.55.155(c)(8) as a new enactment. We are satisfied that it merely clarifies existing law. See *Zurfluh v. State*, 620 P.2d 690, 692-93 (Alaska, 1980) (discussing retrospective application of "curative" legislation). As we noted in *Kelly v. State*, 663 P.2d 967, 971 (Alaska App. 1983), the word "conviction" may have different meanings depending on the context in which it is used. The legislature's earlier reference to convictions, which in-

cluded misdemeanor, indicates an intent to permit a trial court to aggravate a sentence where a defendant had an established history of assaultive behavior. The requirement of a conviction served to ensure adequate verification of the event. Judge Moody's order setting aside Larson's 1972 robbery conviction did not change the fact that a conviction had taken place or establish that Larson had not previously committed a robbery. Therefore the trial court could properly consider the adult robbery conviction, together with the shooting with intent to wound conviction, as part of a pattern of behavior within the requirements of AS 12.55.155(c)(8). Cf. *Ferreira v. State*, 602 P.2d 803, 805-06 (Alaska 1979) (proper to consider prior burglary despite insanity acquittal in determining chance that present crimes will be repeated, as well as defendant's threat to society and his prospects for rehabilitation).

[4] We do not decide whether the prior juvenile adjudications could be used in the same way. Cf. *Davenport v. State*, 543 P.2d 1204, 1211 (Alaska 1975) (trial court sentencing young adult should consider his recent juvenile record in determining the magnitude of his threat to the community and his potential for rehabilitation). Once it was established, however, that Larson had two prior adult convictions making this aggravating factor applicable, the trial court could certainly consider the prior juvenile adjudications in deciding how much weight to give this factor. See *Davenport v. State*, 543 P.2d at 1211. See also *Lee v. State*, 673 P.2d 892, 895 (Alaska App.1983) (prior felony convictions are properly considered in determining appropriate sentence even though they do not meet the statutory requirements for triggering presumptive sentences).

[5] Larson next argues that the trial court erred in using AS 12.55.155(c)(8), as well as AS 12.55.155(c)(12) (defendant on

3. For example, Larson's conduct manifested deliberate cruelty towards M.S. In *Juneby v. State*, 641 P.2d 823, 840 (Alaska App.1982), modified on rehearing, 665 P.2d 30 (Alaska App. 1983), we held that a finding of deliberate cruel-

release under AS 12.30.020 or AS 12.30.040 for another felony conviction), as a basis for aggravating each of his convictions up to a maximum sentence and then imposing the sentences consecutively. Larson reasons that by proceeding in this way, the trial court, in effect, relied upon these aggravating factors more than once. See *Juneby v. State*, 665 P.2d 30, 34 (Alaska App.1983). The state responds that these and certain other aggravating factors were equally applicable to each of Larson's convictions. Further, the state reasons that any aggravating factor standing alone could warrant a maximum sentence. Because Larson has three convictions and at least three aggravating factors were independently established, the state reasons that the trial court, within its discretion, could impose three maximum sentences. Under the state's analysis, the only limitation on imposing consecutive maximum sentences are the requirements set out in *Lacquement v. State*, 644 P.2d 856, 860-62 (Alaska App.1982) (requiring a specific finding of dangerousness where aggregate sentence exceeds presumptive sentence for most serious offense), and *Mutschler v. State*, 560 P.2d 377, 381 (Alaska 1977) (requiring a specific finding of dangerousness before consecutive sentences may exceed the maximum sentence for one count). Since Larson's past record clearly establishes that he is dangerous and since the trial court made the specific finding required by *Lacquement*, the state concludes that we must affirm the total sentence imposed.

We generally agree with the state's analysis. Each of Larson's offenses viewed in isolation involved conduct which could be considered among the most serious within its class. AS 12.55.155(c)(10). When the additional aggravating factors, applied independently to each offense,³ are considered, each of Larson's offenses permitted a maximum sentence. We conclude

ty required either evidence of torture or gratuitous violence. The latter requirement is met in this case. Larson used "gratuitous violence" on M.S. In addition, Larson was indisputably out on bail at the time he committed these offenses.

that Judge Moody's finding of the aggravating factors was erroneous.

[6] Moreover, Larson claims that the supreme court's definition of "first offender." See *State v. Worley*, 1117, 1120 (Alaska 1975) (rejection of prior criminal records, military records, employment records, or alcohol addiction, pre-sentence evaluations and recommendations, previous propensities and possible special personalities). A finding that a defendant is a worst offender justifies imposition of consecutive sentencing the maximum for the most serious count. Such a finding, however, automatically justifies consecutive sentences on a total sentence must still be consistent with the guidelines adopted in *State v. Worley*, P.2d 441, 444 (Alaska 1970) (consideration of rehabilitation, self and others, isolation and community norms). See also *State v. Worley*, 483 P.2d 199 (Alaska App.1972), the supreme court held that a total sentence, which appropriate when viewed in isolation, may be appropriate when viewed as a total sentence that includes other crimes. *Id.* at 201-02. In *Neal v. State*, 628 P.2d 1981, the court stressed that in determining the total sentence, the court must also consider previous sentences that the defendant was required to serve, particularly where the total sentence is made consecutive to those earlier sentences still being served. Primary consideration must be given to the total sentence. See also *Jacimah v. State*, 593 P.2d 1981 (Alaska 1979); *Winslow v. State*, 628 P.2d 1981 (Alaska 1981).

4. Alaska courts have also applied the maximum sentence for first offenders to a maximum sentence for their offenses based on a finding of "gratuitous violence" where psychiatric testimony or other evidence establish that the defendant has severe mental or emotional illness.

that Judge Moody's findings with regard to the aggravating factors were not clearly erroneous.

[6] Moreover, Larson clearly meets the supreme court's definition of a worst offender. See *State v. Wortham*, 537 P.2d 1117, 1120 (Alaska 1975) (requiring consideration of prior criminal convictions, age, military records, employment history, drug or alcohol addiction, pre-sentence report evaluations and recommendations, dangerous propensities and possibility of anti-social personalities). A finding that the defendant is a worst offender will warrant imposition of consecutive sentences exceeding the maximum for the single most serious count. Such a finding will not, however, automatically justify maximum consecutive sentences on all counts. The total sentence must still be considered under the guidelines adopted in *State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970) (requiring consideration of rehabilitation, deterrence of self and others, isolation and affirmation of community norms). See also *Waters v. State*, 483 P.2d 199 (Alaska 1971). In *Waters*, the supreme court held that an individual sentence, which appears excessive when viewed in isolation, might be appropriate when viewed as a component of a total sentence that includes sentences for other crimes. *Id.* at 201-02. In addition, in *Neal v. State*, 628 P.2d 19, 21 (Alaska 1981), the court stressed that in evaluating the total sentence, the reviewing court must also consider previously imposed sentences that the defendant was obligated to serve, particularly where the current sentence is made consecutive to the portion of those earlier sentences still to be served. Primary consideration must therefore be given to the total sentence imposed. See also *Jacinth v. State*, 593 P.2d 263, 266-67 (Alaska 1979); *Winslow v. State*, 587 P.2d

738, 739 (Alaska 1978); *Salazar v. State*, 562 P.2d 694, 696-97 (Alaska 1977).

Four of the *Chaney* criteria: rehabilitation, individual deterrence, deterrence of others, and affirmation of community norms, will almost always be satisfied by a sentence equal to or less than the maximum sentence for the defendant's most serious offense. A longer composite sentence must rest on the fifth *Chaney* criterion: isolation. As we noted in *Houston v. State*, 648 P.2d 1024, 1027 (Alaska App. 1982):

Incarceration and isolation are not synonymous. A judge may feel that a period of incarceration is necessary for rehabilitation or deterrence to emphasize to the defendant the seriousness of his offense and the likely consequences of recidivism. However, as a sentencing goal, isolation is reserved for those who can be neither rehabilitated nor deterred; that is, those who are reasonably likely to commit further criminal activity unless incarcerated.

[7] Thus, isolation as a predominant sentencing criterion should be reserved for dangerous or habitual criminals who can be neither rehabilitated nor deterred and must therefore be incarcerated for a period in excess of the maximum sentence for the defendant's most serious offense. We noted in *Viveros v. State*, 633 P.2d 289, 291 (Alaska App. 1981), that a finding that the defendant is a dangerous or habitual criminal was appropriate where the defendant has two or more felonies within the preceding five years and has previously been incarcerated for one year or longer. Such evidence provides an objective basis for concluding that the defendant is unlikely to be deterred or rehabilitated by a sentence within the range provided for his most serious offense. A finding based on such evidence might satisfy *Lacquement* and *Mutschler*.⁴

4. Alaska courts have also approved consecutive sentences for first offenders greater than the maximum sentence for their most serious offense based on a finding of dangerousness where psychiatric testimony or the facts of the case establish that the defendant is suffering severe mental or emotional illness causally re-

lated to his crimes and cure is uncertain. See, e.g., *Burleson v. State*, 543 P.2d 1195, 1201 (Alaska 1975). We do not suggest that a trial court could not make a *Lacquement* or *Mutschler* finding based on other considerations. Since Larson is clearly a habitual offender, it is unnecessary for us to discuss other considerations

[8] It is clear that the trial court was justified in designing a sentence for Larson that would reflect the importance of isolating him from society. Larson has a number of convictions for crimes of violence and, disregarding the period of time that he was incarcerated and thus unable to commit crimes, less than five years elapsed between his convictions. He had served substantially more than one year of continuous incarceration prior to committing these crimes. Viewing the totality of the circumstances, the trial court could well conclude that Larson could not be deterred or rehabilitated by a sentence of twenty years or less, the maximum sentence for his most serious offense, and that, consequently, a longer sentence was required. See *Mutschler v. State*, 560 P.2d at 381.

We are also satisfied that *Hintz v. State*, 627 P.2d 207 (Alaska 1981), *Helmer v. State*, 616 P.2d 884 (Alaska 1980), and *Tookak v. State*, 648 P.2d 1018 (Alaska App. 1982), are distinguishable. Hintz, Tookak, and Helmer committed atrocious crimes of violence. However, Helmer was a first offender and Hintz had a criminal record involving primarily property crimes. Tookak had prior misdemeanor convictions for assault and battery and disorderly conduct. Tookak also had two prior felony convictions for grand larceny and burglary. Neither Hintz, Tookak, nor Helmer exhibited the consistent pattern of crimes of violence that Larson does.

[9] Larson's situation is more akin to the defendant in *Nix v. State*, 653 P.2d 1093, 1100-01 (Alaska App. 1982). Although Nix committed a series of sexual assaults against different victims while Larson committed a single series of crimes against D.S. and M.S., Nix's prior record

consisted of property crimes while Larson's prior record involved crime of violence. We approved a total sentence for Nix of forty years which included consecutive sentences. *Id.* at 1101. Recognizing that Nix and Larson are significantly different in some respects, we nevertheless conclude that their criminal records, interpreted in the light of the conduct for which they were convicted, warrant similar sentences. Larson's total sentence of forty years to serve is not clearly mistaken. *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

Nevertheless, the sentences imposed for the crimes against D.S. and M.S. should not be made consecutive to Larson's prior conviction for shooting with intent to wound. As we noted in *Nix v. State*, 653 P.2d at 1101, "[t]here is nothing in the record which supports a finding that potential incarceration of forty years would not adequately protect the public."

The judgment of the superior court is **AFFIRMED** in part and **REVERSED** in part. The sentence is **VACATED** and the case **REMANDED** to the superior court for resentencing. On remand Larson should be sentenced as a second felony offender and his total sentence, including the unserved portion of his previous sentence for shooting with intent to wound, must not exceed forty years.

COATS, J., not participating.



which might also warrant a characterization

that he was "dangerous".

In the Matter of a Member
Bar of Arizona, Burto
BENTLEY, Respon

No. SB-284.

State Bar No. 81-3

Supreme Court of A
In Banc.

May 29, 1984.

Disciplinary action was taken by the State Disciplinary Board from the Code of Professional Ethics. It recommended suspension from the practice of law for 30 days, and attorney Bentley, through his attorney, The Supreme Court, Cameron representation of one party and another party, and, after receiving the consent of both parties, performing legal services for the second party unrelated to the matter, and then later filing suit against the second party for and on behalf of the first party, warrants censure and assessment of costs.

Order accordingly.

1. Attorney and Client ⇐20

While it is usually improper for an attorney to simultaneously represent opposing parties, it is not always so. 17A A.R.S. Sup.Ct. Rules, Rule 29 Prof. Resp., DR5-105.

2. Attorney and Client ⇐21.1

Even with full disclosure, a conflict in an attorney's representation of opposing parties may be waived by the parties. 17A A.R.S. Sup.Ct. Rules, Rule 29(a), Code of Prof. Resp., DR5-105.

3. Attorney and Client ⇐21.1

Representation of one party and another party and, after receiving the consent of both parties, performing legal services for the second party unrelated to the matter, and then later filing suit against the second party for and on behalf of the first party, gave an appearance of impropriety and created a conflict of interest warranting censure and assessment of costs.

Battle against drunk driving to continue

The proposals forwarded recently by Anchorage Sen. Mitch Abood in the continuing legislative attack on drunk drivers show that last year's new, tougher DWI laws were not the end of the laudable campaign against that problem in the 49th state.

Drunk drivers are a menace, and the Legislature recognized that when it enacted measures that not only remove DWI offenders from the roads and lock them in jail, but revoke their licenses for up to 10 years for repeat arrests.

Now, Sen. Abood has put together a package that tightens loopholes and eliminates problems that have surfaced since the tougher DWI bill became law.

The first plan is to immediately fingerprint and photograph suspects arrested for drunk driving or other offenses that may be related to drunk driving, such as negligent homicide. Under the present law, such suspects can be released and processed later.

Another requires that DWI offenders spend time in jail. In some instances, they have been allowed to enroll in a drug or alcohol treatment program after being sentenced for a drunk driving arrest and the time spent at the center is credited against their sentence. While rehabilitation is an important part of curbing drunk driving, the purpose of the mandatory jail sentences is to deter drinking and driving. Sen. Abood is right when he says drunk drivers should serve jail time. If they take part in a treatment program, fine, but that should not supplant jail time.

Obtaining blood samples from suspected drunk drivers injured in an accident and allowing police to administer breath tests to drivers before they call their lawyer are two other proposals that would give the state authority to gather the evidence it needs to successfully prosecute a drunk-driving charge. Now, when a person is allowed to wait until a lawyer shows up, the evidence of alcohol consumption can dissipate, thus weakening the state's case.

Other bills will be forthcoming from the governor's task force on drunk driving.

Meanwhile, Sen. Abood's proposals deserve close scrutiny — and the support of all responsible Alaskans.

While some of them sound tough, they should be to prevent the needless deaths caused by drunk driving.

4 JUNEAU EMPIRE, TUESDAY, JANUARY 29, 1985

Opinion

JUNEAU EMPIRE

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STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB 72
Title: An Act Relating to
Sentencing
Sponsor: Sen. Abood
Requestor: Sen. Abood
Date of Request: 1-24-85

FISCAL DETAIL

Agency Affected: Public Safety
Program Category Affected: _____
Administration of Justice
BRU, Program or Subprogram(s) Affected: _____
Alaska State Troopers

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
----------------	--	--	--	--	--	--

REVENUE						
----------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

Prepared By: Paul Conger Phone: 465-4338
 Division: Administrative Services Date: 1-24-85
 Approved by Commissioner: [Signature] Date: 1/28/85
 Agency: Public Safety

Distribution (by Agency preparing fiscal note):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

S13 17 consortium

Contact Law,
Corrections

file SB 72

Introduced: 1/25/85
Referred: Health, Education & Social Services
and Judiciary

1 IN THE SENATE

BY THE RULES COMMITTEE BY
REQUEST OF THE GOVERNOR

2

SENATE BILL NO. 98

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act related to the effects of criminal convic-
7 tions."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 12.55.085(e) is amended to read:

10 (e) Upon the discharge by the court without imposition of sen-
11 tence, the court may set aside the conviction and issue to the person
12 a certificate to that effect. However, the record of a conviction set
13 aside under this subsection may not be sealed or expunged.

14 * Sec. 2. AS 12.55.085 is amended by adding a new subsection to read:

15 (f) A conviction set aside under (e) of this section is a prior
16 conviction under AS 12.55.145 and may also be used

17 (1) as a factor in aggravation under AS 12.55.155(c)(8);

18 (2) in a classification or parole determination proceeding
19 under AS 33; and

20 (3) in a licensing proceeding when good character is a
21 condition of obtaining a license.

22 * Sec. 3. AS 33.20 is amended by adding a new section to read:

23 Sec. 33.20.090. EFFECTS OF A PARDON. (a) Except as provided in
24 (b) of this section, a conviction pardoned under AS 33.20.070 may only
25 be used

26 (1) as a factor in aggravation under AS 12.55.155(c)(8);

27 (2) in a classification or parole determination proceeding
28 under AS 33; and

29 (3) in a licensing proceeding when good character is a

1 condition of obtaining a license.

2 (b) Notwithstanding (a) of this section, in granting a pardon
3 the governor may expand or limit the purposes for which a pardoned
4 conviction may be used. Any expansion or limitation under this sub-
5 section must be specifically set out in the pardon.

6 (c) Unless otherwise provided for under (b) of this section, a
7 pardon does not result in the expunction of a criminal conviction.

h orders are directly original sentence, under indirectly imposed as a probation. under AS it was error to revoke tion in spite of finding pay restitution, a condi on, was willful. Lominac Anchorage, Ct. App. Op. No. 5960, 658 P.2d 792

State, Ct. App. Op. No. 1). 660 P.2d 450 (1983).

court may order a munity work as a pended imposition ion ordered. If the may recommend to erform community

signed to reduce or health, or improve ties, or education. on a person except

offense the option portion of a fine if fine. The value of

offense the option of imprisonment. of eight hours for bstitution of com- imprisonment or ent.

e performing com- umed by the state en the state pays dical expenses by gated to the state. am §§ 1, 2 ch 104

. in subsection (a), in the first sentence receding "sentenced" ce.

NOTES TO DECISIONS

Discussion of disparate sentences (File Nos. 7188, 6247, 7114), 662 P.2d 954 for similar sexual assault offenses, see (1983). Langton v. State, Ct. App. Op. No. 236

Secs. 12.55.060 — 12.55.075. Prior convictions; sentencing reports. [Repealed, § 21 ch 166 SLA 1978.]

Sec. 12.55.080. Suspension of sentence and probation. Upon entering a judgment of conviction of a crime, or at any time within 60 days from the date of entry of that judgment of conviction, a court, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution or balance of the sentence or a portion thereof, and place the defendant on probation for a period and upon the terms and conditions as the court considers best. (§ 8.08 ch 34 SLA 1962; am § 24 ch 43 SLA 1964; am § 8 ch 68 SLA 1965)

Cross references. — For similar court rule, see Cr. R. 35(k); for modification of sentences, see AS 12.55.088.

NOTES TO DECISIONS

The power to suspend sentence is not inherent in the judicial branch of government. *Pete v. State, Sup. Ct. Op. No. 137 (File No. 290), 379 P.2d 625 (1963).*

Such power must be conferred by the legislature. — The power to suspend sentences exists only when conferred upon the judiciary by the legislature. *Pete v. State, Sup. Ct. Op. No. 137 (File No. 290), 379 P.2d 625 (1963).*

Parallels 18 U.S.C. § 3651. — Alaska's probation statutes, this section, AS 12.55.090 and AS 12.55.100 closely parallel the federal statute, 18 U.S.C. § 3651, which empowers federal district courts to grant probation. *Brown v. State, Sup. Ct. Op. No. 1367 (File No. 2890), 559 P.2d 107 (1977).*

This section and AS 12.55.090 appear to have been modeled after the federal statute, 18 U.S.C. § 3651. *Tiedeman v. State, Sup. Ct. Op. No. 1592 (File No. 3394), 576 P.2d 114 (1978).*

The Alaska probation statutes, this section, AS 12.55.090 and 12.55.100, use much of the same language as 18 U.S.C. § 3651, and were apparently derived from the federal law. *Gonzales v. State, Sup. Ct. Op. No. 2040 (File No. 4271), 608 P.2d 23 (1980).*

This section and AS 12.55.090 construed in *pari materia*. — Since both essentially identical sections were enacted together in § 1, ch. 195, SLA 1955, this section and AS 12.55.090 must be construed with reference to each other as in *pari materia*. *Jackson v. State, Sup. Ct. Op. No. 1194 (File No. 2422), 541 P.2d 23 (1975).*

This section and AS 12.55.085(a) now apply to Title 17. *Stonefield v. State, Ct. App. Op. No. 54 (File No. 5507), 635 P.2d 494 (1981).*

Independent determination of good cause required. — The requirement of an independent determination of good cause beyond mere proof of a probation violation for revocation of probation applies to cases involving suspended impositions of sentence under this section and AS 12.55.085(a) as well as to cases involving suspended executions of sentence under this section. *Rich v. State, Ct. App. Op. No. 66 (File No. 5566), 640 P.2d 159 (1982).*

State law prohibits a city from enacting an ordinance providing for a mandatory minimum sentence. *City of Kodiak v. Jackson, Sup. Ct. Op. No. 1741 (File No. 3480), 584 P.2d 1130 (1978).*

Mandatory minimum sentences created by city ordinances are invalid when in con-

held that the probationer convicted of the crime *DeVoe*, Sup. Ct. Op. No. 88, 560 P.2d 12 (1977). He should be revoked on the conviction which is on appeal before not yet final. *Sup. Ct. Op. No. 1622*, 8 P.2d 591 (1978). The court with the attendant safeguards, constitutes "use" to find that conditions have been violated and should be revoked. *Sup. Ct. Op. No. 1622*, 8 P.2d 591 (1978).

cannot claim bail in statutes, this section 110, since they fail to *in v. State*, Sup. Ct. Op. 1785, 517 P.2d 1389

ation of sentence not a jeopardy provision. It is not imposing suspension in conjunction with the sentence was an obvious error in the sentence, moments to include suspended sentence a constitutional prohibition. *Dentler v. State*, 1 (File No. 7248), 661

nan v. State, Sup. Ct. Op. 562, 404 P.2d 644 *e*, Sup. Ct. Op. No. 889 P.2d 130 (1973); *Call* Op. No. 890 (File No. 1973); *White v. State*, 5 (File No. 1907), 523 *nes v. State*, Sup. Ct. Op. 2689, 548 P.2d 958 *State*, Sup. Ct. Op. No. 552 P.2d 150 (1976); *Op. Ct. Op. No. 1445*, 36 P.2d 630 (1977); *Sup. Ct. Op. No. 1740* P.2d 805 (1978); *Deal* Op. No. 1769 (File No. 0 (1978); *Gilbert v. State*, No. 1889 (File No. 1979); *Loola v. State*, 1 (File No. 4858), 608 *v. State*, Sup. Ct. Op. 4572, 616 P.2d 15

es v. State, Sup. Ct. Op. 1845, 511 P.2d 1292 *ite*, Sup. Ct. Op. No. 606 P.2d 390 (1980). *State*, Sup. Ct. Op. 2166, 530 P.2d 751

(1975); *Taylor v. State*, Sup. Ct. Op. No. 1436 (File No. 2924), 564 P.2d 1219 (1977); *Szeratics v. State*, Sup. Ct. Op. No. 1525 (File No. 3390), 572 P.2d 63 (1977); *Rice v. State*, Sup. Ct. Op. No. 1785 (File No. 3531), 589 P.2d 419 (1979); *Gilbert v. State*, Sup. Ct. Op. No. 1889 (File No. 3406), 598 P.2d 87 (1979); *Lock v. State*, Sup. Ct. Op. No. 2061 (File No. 4195), 609

P.2d 539 (1980); *Nielsen v. State*, Sup. Ct. Op. No. 2349 (File No. 4677), 627 P.2d 1077 (1981); *Morris v. State*, Sup. Ct. Op. No. 2376 (File Nos. 4264, 4318), 630 P.2d 13 (1981); *Miller v. State*, Ct. App. Op. No. 24 (File No. 4972), 629 P.2d 546 (1981); *Lacquement v. State*, Ct. App. Op. No. 85 (File No. 5741), 644 P.2d 856 (1982).

Sec. 12.55.085 Suspending imposition of sentence. (a) If it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence which may be imposed, and upon the terms and conditions which the court determines, and shall place the person on probation, under the charge and supervision of the probation officer of the court during the suspension.

(b) At any time during the probationary term of the person released on probation, a probation officer may, without warrant or other process, rearrest the person so placed in the officer's care and bring the person before the court, or the court may, in its discretion, issue a warrant for the rearrest of the person and may revoke and terminate the probation, if the interests of justice require, and if the court, in its judgment, has reason to believe that the person placed upon probation is violating the conditions of probation, or engaging in criminal practices, or has become abandoned to improper associates, or a vicious life.

(c) Upon the revocation and termination of the probation, the court may pronounce sentence at any time after the suspension of the sentence within the longest period for which the defendant might have been sentenced, subject to the limitation specified in AS 12.55.086(c).

(d) The court may at any time during the period of probation revoke or modify its order of suspension of imposition of sentence. It may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on probation warrants it, terminate the period of probation and discharge the person held. If the court has not revoked the order of probation and pronounced sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect. (§ 1 ch 50 SLA 1965; am § 2 ch 32 SLA 1979)

§ 12.80.020

question as to privilege against R2d 463. Placement of judgment on juvenile delinquent 3d 657. in contempt pro-

contempt pro- charges other than contempt pro- transactions, 88

plaint. No per- unless on a ses arising in ment may be e by informa- the Rules of

distinction be- in information i accusation or er, made by a . to the justice of officer, alleging elated the law, ; an accusation fficer, charging . In the former ccusation was cutor. Mabry v. 1922), aff'd, 290

§ 12.80.030

CODE OF CRIMINAL PROCEDURE

§ 12.80.050

Amendment of indictment or informa- tion with respect to name or capacity of person alleged to have been victim of crime as ground for continuance, 85 ALR2d 1204.

Power of court to make or permit amend-

ment of indictment with respect to allegations as to nature of activity, happening, or circumstances, 17 ALR3d 1285.

Use of abbreviation in indictment or information, 92 ALR3d 494.

Sec. 12.80.030. Taxation of costs. No costs may be taxed to the defendant in a criminal action or proceeding begun or prosecuted in any of the courts of the state unless otherwise ordered by supreme court rule. (§ 1 ch 50 SLA 1963)

Sec. 12.80.040. Violations and infractions. Except as provided in AS 11.81.900(b) and AS 28.40.050(d), all laws of the state relating to misdemeanors apply to violations and infractions, including the powers of peace officers, the jurisdiction of courts and the periods for commencing actions and for bringing a case to trial. (§ 42 ch 102 SLA 1980)

Legislative history reports. — For report on ch. 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supple-

ment, No. 44 (May 29, 1980) or 1980 House Journal Supplement, No. 79 (May 29, 1980).

Sec. 12.80.050. Photographic evidence of property wrongfully taken or damaged. (a) In a criminal proceeding or a children's court proceeding involving the wrongful taking or damaging of property, photographs of the property are competent evidence of the property and are admissible in the proceeding to the same extent as if the property had been introduced as evidence.

(b) Photographs of property that are to be introduced as evidence under this section shall be accompanied by a written description of the property, the name of the owner of the property, the location where the alleged crime occurred, the name of the investigating peace officer, the date the photograph was taken, and the name and signature of the photographer. The written description shall be signed by the investigating peace officer under penalty of perjury under AS 09.63.020. (§ 40 ch 143 SLA 1982)

Revisor's notes. — To the extent that the provisions of this section conflict with Rule 901 of the Alaska Rules of Evidence,

the rule controls, as sec. 44, ch. 143, SLA 1982 did not receive the required 2/3 vote in the legislature.

NOTES TO DECISIONS

Applied in Hatfield v. State, Ct. App. Op. No. 257 (File Nos. 6371, 6732), 663 P.2d 987 (1983).

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imum term of imprisonment provided in (c) or (d) of this section, and the minimum sentence provided for in (c) or (d) of this section may not be otherwise reduced. (§ 12 ch 166 SLA 1978; am § 2 ch 139 SLA 1980; am § 22 ch 59 SLA 1982; am § 13 ch 61 SLA 1982; am § 31 ch 143 SLA 1982; am §§ 4, 5 ch 92 SLA 1983)

Effect of amendments. — The 1980 amendment added subsection (c).

The first 1982 amendment substituted "fourth degree" for "third degree" in the first sentence of subsection (c).

The second 1982 amendment made the same change as the first 1982 amendment.

The third 1982 amendment, in subsection (c), substituted "fourth degree" for

"third degree" and "20 days" for "10 days" in the first sentence and substituted "be imprisoned" for "by imprisoned" in the last sentence.

The 1983 amendment deleted the second and third sentences of subsection (c), concerning suspension of the execution or imposition of a sentence, and added subsections (3) and (e).

NOTES TO DECISIONS

Constitutionality of presumptive sentencing provisions. — See notes under same heading, AS 12.55.125, *Nell v. State*, Ct. App. Op. No. 77 (File No. 5565), 642 P.2d 1361 (1982).

Consecutive sentencing by district court permissible under former law. —

See *State v. Pete*, Sup. Ct. Op. No. 372 (File No. 673), 420 P.2d 338 (1966), decided under former AS 11.05.010.

Cited in *Law v. State*, Sup. Ct. Op. No. 2301 (File No. 4552), 624 P.2d 284 (1981); *Kelly v. State*, Ct. App. Op. No. 251 (File No. 6311), 663 P.2d 967 (1983).

Sec. 12.55.140. Sentences for violations. [Repealed, § 23 ch 59 SLA 1982.]

Sec. 12.55.145. Prior convictions. (a) For purposes of considering prior convictions in imposing sentence under AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i)

(1) a prior conviction may not be considered if a period of 10 or more years has elapsed between the date of the defendant's unconditional discharge on the immediately preceding offense and commission of the present offense unless the prior conviction was for an unclassified or class A felony;

(2) a conviction in this or another jurisdiction of an offense having elements similar to those of a felony defined as such under Alaska law at the time the offense was committed is considered a prior felony conviction;

(3) two or more convictions arising out of a single, continuous criminal episode during which there was no substantial change in the nature of the criminal objective are considered a single conviction unless the defendant was sentenced to consecutive sentences for the crimes; offenses committed while attempting to escape or avoid detection or apprehension after the commission of another offense are not part of the same criminal episode or objective.

(b) When sentence is imposed under this chapter, prior convictions not expressly admitted by the defendant must be proved by authenti-

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(c) If the conviction that the evidence are substantial Alaska law provided in (a) purportedly conviction court and s than 10 day of denial sh and may be

(d) Matter sitting with that the defendant conviction, the not occur with conviction sh (a)(2) of this contrary beyond more conviction of this section

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Revisor's notes SLA 1982 enacted was renumbered in

Cross reference convictions prior to Jan date of ch. 166, SL 166, SLA 1978, in the Special Acts.

Effect of amendment, in subsection "AS 12.55.125(c), (d) or (i)" for "this chapter introductory language more years" for "seven

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ated copies of court records served on the defendant or the defendant's
 counsel at least 20 days before the date set for imposition of sentence.

(c) If the defendant denies the authenticity of a prior judgment of
 conviction, that the defendant is the person named in the judgment,
 that the elements of a prior offense committed in another jurisdiction
 are substantially identical to those of a felony defined as such under
 Alaska law, or that a prior conviction occurred within the period speci-
 fied in (a)(1) of this section or if the defendant alleges that two or more
 purportedly separate prior convictions should be considered a single
 conviction under (a)(3) of this section, the defendant shall file with the
 court and serve on the prosecuting attorney notice of denial no later
 than 10 days before the date set for imposition of sentence. The notice
 of denial shall include a concise statement of the grounds relied upon
 and may be supported by affidavit or other documentary evidence.

(d) Matters alleged in a notice of denial shall be heard by the court
 sitting without a jury. If the defendant introduces substantial evidence
 that the defendant is not the person named in a prior judgment of
 conviction, that the judgment is not authentic, that the conviction did
 not occur within the period specified in (a)(1) of this section, or that a
 conviction should not be considered a prior felony conviction under
 (a)(2) of this section, then the burden is on the state to prove the
 contrary beyond a reasonable doubt. The burden of proof that two or
 more convictions should be considered a single conviction under (a)(3)
 of this section is on the defendant by clear and convincing evidence.

(e) The authenticated judgments of courts of record of the United
 States, the District of Columbia, or of any state, territory, or political
 subdivision of the United States are prima facie evidence of conviction.
 (§ 12 ch 166 SLA 1978; am §§ 32-34 ch 143 SLA 1982)

Revisor's notes. — Section 35, ch. 143,
 SLA 1982 enacted a subsection (f) which
 was renumbered in 1982 as AS 12.55.147.

Cross references. — For effect of con-
 victions prior to January 1, 1980 (effective
 date of ch. 166, SLA 1978), see § 23, ch.
 166, SLA 1978, in the Temporary and Spe-
 cial Acts.

Effect of amendments. — The 1982
 amendment, in subsection (a), substituted
 "AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2),
 or (i)" for "this chapter" at the end of the
 introductory language; substituted "10 or
 more years" for "seven or more years" and

added "unless the prior conviction was for
 an unclassified or class A felony" to the
 end, both in paragraph (1); substituted
 "similar" for "substantially identical" and
 inserted "at the time the offense was
 committed" in paragraph (2); and substi-
 tuted "unless the defendant was sentenced
 to consecutive sentences for the crimes;"
 for "except that" in paragraph (3). The
 amendment also substituted "20 days" for
 "10 days" in subsection (b), and substi-
 tuted "10 days" for "five days" near the end
 of the first sentence of subsection (c).

Sec. 12.55.147. Fingerprints at time of sentencing. When a defendant is convicted of a felony by a court of this state, the defendant's fingerprints shall be placed on the judgment of conviction in open court, on the record, at the time of sentencing. The defendant and the person administering the fingerprinting shall sign their names under the fingerprints. (§ 35 ch 143 SLA 1982)

Revisor's notes. — Enacted as AS 12.55.145(f). Renumbered in 1982.

Sec. 12.55.155. Factors in aggravation and mitigation. (a) If a defendant is convicted of an offense and is subject to sentencing under AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) and

(1) the presumptive term is four years or less, the court may decrease the presumptive term by an amount as great as the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation;

(2) the presumptive term of imprisonment is more than four years, the court may decrease the presumptive term by an amount as great as 50 percent of the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation.

(b) Sentence increments and decrements under this section shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section.

(c) The following factors shall be considered by the sentencing court and may aggravate the presumptive terms set out in AS 12.55.125:

(1) a person, other than an accomplice, sustained physical injury as a direct result of the defendant's conduct;

(2) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person;

(3) the defendant was the leader of a group of three or more persons who participated in the offense;

(4) the defendant employed a dangerous instrument in furtherance of the offense;

(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;

(6) the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices;

(7) a prior felony conviction considered for the purpose of invoking the presumptive terms of this chapter was of a more serious class of offense than the present offense;

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(8) the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior;

(9) the defendant knew that the offense involved more than one victim;

(10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;

(11) the defendant committed the offense pursuant to an agreement that the defendant either pay or be paid for the commission of the offense, and the pecuniary incentive was beyond that inherent in the offense itself;

(12) the defendant was on release under AS 12.30.020 or 12.30.040 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;

(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, fire fighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;

(14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group;

(15) the defendant has three or more prior felony convictions;

(16) the defendant's criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight;

(17) the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income;

(18) the offense was a crime specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit comprised of those living together in the same dwelling as the defendant;

(19) the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult;

(20) the defendant was on furlough under AS 33.30 or on parole or probation for another felony charge or conviction;

(21) the defendant has a criminal history of repeated instances of conduct violative of criminal laws, whether punishable as felonies or misdemeanors, similar in nature to the offense for which the defendant is being sentenced under this section;

(22) the defendant knowingly directed the conduct constituting the offense at a victim because of that person's race, sex, color, creed, ancestry, or national origin;

(23) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the delivery of a controlled substance under circumstances manifesting an intent to distribute the substance as part of a commercial enterprise;

(24) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the transportation of controlled substances into the state;

(25) the defendant is convicted of an offense specified in AS 11.71 and the offense involved large quantities of a controlled substance;

(26) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance that had been adulterated with a toxic substance.

(d) The following factors shall be considered by the sentencing court and may mitigate the presumptive terms set out in AS 12.55.125:

(1) the offense was principally accomplished by another person, and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;

(2) the defendant, although an accomplice, played only a minor role in the commission of the offense;

(3) the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but which significantly affected the defendant's conduct;

(4) the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant;

(5) the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age;

(6) in a conviction for assault under AS 11.41.200 — 11.41.230, the defendant acted with serious provocation from the victim;

(7) except in the case of a crime defined by AS 11.41.410 — 11.41.470, the victim provoked the crime to a significant degree;

(8) *[Repealed, § 42 ch 143 SLA 1982.]*

(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;

(10) before the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained;

(11) the defendant was motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for the defendant's immediate family;

(12) the defendant assisted authorities to detect or apprehend other persons who committed the offense with the defendant;

(13) the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;

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(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved small quantities of a controlled substance;

(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;

(16) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home.

(e) If a factor in aggravation is a necessary element of the present offense, or requires the imposition of a presumptive term under AS 12.55.125(c)(2), (d)(3) or (e)(3), that factor may not be used to aggravate the presumptive term. If a factor in mitigation is raised at trial as a defense reducing the offense charged to a lesser included offense, that factor may not be used to mitigate the presumptive term.

(f) If the state seeks to establish a factor in aggravation at sentencing or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence. Factors in aggravation and factors in mitigation must be established by clear and convincing evidence before the court sitting without a jury. All findings must be set out with specificity.

(g) Voluntary alcohol or other drug intoxication or chronic alcoholism or other drug addiction may not be considered an aggravating or mitigating factor.

(h) In this section, "serious provocation" has the meaning given in AS 11.41.115(f). (§ 12 ch 166 SLA 1978; am §§ 39-41 ch 102 SLA 1980; am §§ 19, 20 ch 45 SLA 1982; am §§ 36, 38, 39, 42 ch 143 SLA 1982; am §§ 6, 7 ch 92 SLA 1983)

Revisor's notes. — Paragraphs (23)-(26) of subsection (c) were enacted as (19)-(22). Renumbered in 1982.

Cross references. — For considerations in imposing sentence, see AS 12.55.005 and note to AS 12.55.120; for legislative purpose of ch. 45, SLA 1982, see § 1, ch. 45, SLA 1982, in the Temporary and Special Acts.

Effect of amendments. — The 1980 amendment substituted "prior convictions for offenses, including misdemeanors, that involved aggravated or repeated instances of assaultive behavior" for "one or more convictions for misdemeanors having assault as a necessary element" at the end of paragraph (8) of subsection (c), added paragraphs (15)-(18) of subsection (c), and added paragraph (13) of subsection (d).

The first 1982 amendment added paragraphs (23)-(26) in subsection (c) and added paragraphs (14)-(16) in subsection (d).

The second 1982 amendment, in subsection (a), substituted "AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i)" for "AS 12.55.125(c)(1), (c)(2), (c)(3), (d)(1), (d)(2), (e)(1), or (e)(2) of this chapter" in the introductory language. In subsection (d), the amendment repealed paragraph (8), which read "a prior felony conviction considered for the purpose of invoking the presumptive terms of this chapter was of a less serious class of offense than the present offense." In subsection (c), the amendment rewrote paragraph (8), which formerly read "the defendant has a criminal history consisting of prior convictions

3691), 578 P.2d 971 (1978); Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980); State v. Brinkley, Ct. App. Op. No. 361 (File No. A-164), P.2d (1984); Cleary v. State, Sup. Ct. Op. No. 1257 (File No. 2623), 548 P.2d 952 (1976); Salazar v. State, Sup. Ct. Op. No. 1404 (File No. 2567), 562 P.2d 694 (1977); Cleary v. State, Sup. Ct. Op. No. 1431 (File No. 3059), 564 P.2d 374 (1977); Amidon v. State, Sup. Ct. Op. No. 1434 (File Nos. 2511, 2512), 565 P.2d 1248 (1977); Black v. State, Sup. Ct. Op. No. 1506 (File No. 3327), 569 P.2d 804 (1977); Sumabat v. State, Sup. Ct. Op. No. 1648 (File No. 3739), 580 P.2d 323 (1978); Hansen v. State, Sup. Ct. Op. No. 1689 (File No. 3412), 582 P.2d 1041 (1978); Kanipe v. State, Sup. Ct. Op. No. 2242 (File No. 4993), 620 P.2d 678 (1980); Hintz v. State, Sup. Ct. Op. No. 2334 (File No. 3541), 627 P.2d 207 (1981).

Inclusion of improper reference to unverified police contacts did not require remand for resentencing before different judge. — See Parks v. State, Sup. Ct. Op. No. 1529 (File No. 3209), 571 P.2d 1003 (1977).

Reference to unverified police contacts in a presentence report does not require a remand for resentencing where the record

indicates that the sentencing judge was not unduly or improperly influenced by reference to the unverified police contacts. Pascoe v. State, Sup. Ct. Op. No. 2249 (File No. 4290), 628 P.2d 547 (1980).

Case remanded for resentencing. — See Neal v. State, Sup. Ct. Op. No. 2341 (File No. 4787), 628 P.2d 19 (1981).

Case remanded for sentence review. — Although a sentence of 15 years' imprisonment with eligibility for parole at the discretion of the parole board upon conviction of manslaughter was not excessive, since the trial court had sentenced defendant as if his conviction had been obtained within one year of the crime and therefore substantially ignored his subsequent history of steady employment, his meritorious service in the army, and his lack of involvement in any criminal activity other than a few traffic offenses in the 12 years since the commission of the crime, the case was remanded for the purpose of permitting the trial court to review the sentence it imposed, in light of all available information concerning defendant without excluding the time period commencing one year from the time of the killing until the present. Padie v. State, Sup. Ct. Op. No. 1843 (File No. 3564), 594 P.2d 50 (1979).

Sec. 12.55.125. Sentences of imprisonment for felonies. (a) A defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years.

(b) A defendant convicted of murder in the second degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years.

(c) A defendant convicted of a class A felony may be sentenced to a definite term of imprisonment of not more than 20 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, five years;

(2) if the offense is a first felony conviction, other than for manslaughter, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, or knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, seven years;

(3) if the offense

(4) if the offense

(d) A defendant convicted of a class A felony shall be sentenced to the following definite term of imprisonment provided in AS 12.55.125:

(1) if the offense

(2) if the offense

(3) if the offense knowingly directed toward or otherwise clearly directed toward a peace officer, emergency medical technician, ambulance attendant, or other emergency responder in the performance of official duties;

(e) A defendant convicted of a class A felony shall be sentenced to the following definite term of imprisonment provided in AS 12.55.125:

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(3) if the offense knowingly directed toward or otherwise clearly directed toward a peace officer, emergency medical technician, ambulance attendant, or other emergency responder in the performance of official duties;

(f) If a defendant is

(1) imprisonment for a term of not more than 20 years provided under AS 12.55.085;

(3) imprisonment for a term of not more than 20 years, otherwise reduced.

(g) If a defendant is convicted of this section, except as provided in AS 12.55.175,

(1) imprisonment for a term of not more than 20 years;

(2) imposition of a term of not more than 20 years; or

(3) terms of imprisonment otherwise provided.

(h) Nothing in this section shall be construed to limit the sentencing judge's authority to

(i) A defendant convicted of a class A felony shall be sentenced to the following definite term of imprisonment provided in AS 12.55.125:

sentencing judge was properly influenced by verified police contacts. Ct. Op. No. 2249 (File d 547 (1980).
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 for sentence review. sentence of 15 years' imprisonment for parole at the parole board upon conviction was not excessive, defendant had sentenced defendant had been obtained the crime and therefore his subsequent history, his merit of army, and his lack of criminal activity other offenses in the 12 years of the crime, the case for the purpose of court to review the in light of all available concerning defendant the time period from the time of the sent. Padie v. State, 3 (File No. 3564), 594

felonies. (a) A defendant shall be sentenced to not more than second degree, sentence in the first degree of at least years, and shall be subject to adjustment as does not involve years; other than for defendant used a dangerous weapon in committing the offense constituting the offense, peace officer, fire fighter, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, seven

- (3) if the offense is a second felony conviction, 10 years;
- (4) if the offense is a third felony conviction, 15 years.
- (d) A defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more than 10 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:
 - (1) if the offense is a second felony conviction, four years;
 - (2) if the offense is a third felony conviction, six years;
 - (3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, two years.
- (e) A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:
 - (1) if the offense is a second felony conviction, two years;
 - (2) if the offense is a third felony conviction, three years;
 - (3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, one year.
- (f) If a defendant is sentenced under (a) or (b) of this section,
 - (1) imprisonment for the prescribed minimum term may not be suspended under AS 12.55.080;
 - (2) imposition of sentence may not be suspended under AS 12.55.085;
 - (3) imprisonment for the prescribed minimum term may not be otherwise reduced.
- (g) If a defendant is sentenced under (c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) of this section, except to the extent permitted under AS 12.55.155 — 12.55.175,
 - (1) imprisonment may not be suspended under AS 12.55.080;
 - (2) imposition of sentence may not be suspended under AS 12.55.085;
 - (3) terms of imprisonment may not be otherwise reduced.
- (h) Nothing in this section or AS 12.55.135 limits the discretion of the sentencing judge except as specifically provided.
- (i) A defendant convicted of sexual assault in the first degree or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, eight years;

(2) if the offense is a first felony conviction, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 10 years;

(3) if the offense is a second felony conviction, 15 years;

(4) if the offense is a third felony conviction, 25 years. (§ 12 ch 166 SLA 1978; am § 18 ch 45 SLA 1982; am §§ 28-30 ch 143 SLA 1982; am § 8 ch 78 SLA 1983; am §§ 1-3 ch 92 SLA 1983)

Cross references. — For classification of felonies and misdemeanors, see AS 11.81.250; for authorized fines, see AS 12.55.035; for reduction of sentence for good behavior, see AS 33.20.010.

Effect of amendments. — The first 1982 amendment in subsection (b), deleted "or" preceding "kidnapping" and inserted "or misconduct involving a controlled substance in the first degree."

The second 1982 amendment in subsection (c), redesignated former paragraphs (1)-(3) as present paragraphs (2)-(4), added present paragraph (1), and substituted "possessed a firearm, used a dangerous instrument" for "possessed or used a firearm" and "seven years" for "six years" in present paragraph (2). The amendment also substituted "under (c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) of this section" for

"under (c)(1), (c)(2), (c)(3), (d)(1), (d)(2), (e)(1), or (e)(2) of this section" in the introductory language of subsection (g), corrected the section number set out in paragraphs (1) and (2) of subsection (g), and added subsection (i).

The first 1983 amendment inserted "or sexual abuse of a minor in the first degree" in the introductory language of subsection (i).

The second 1983 amendment in (c)(2) added "or knowingly directed . . . at the time of the offense," added paragraph (3) of subsection (d), added paragraph (3) of subsection (e), and made other minor punctuation changes.

Editor's notes. — For declaration of legislative purpose, see § 1, ch. 45, SLA 1982 in the 1982 Temporary and Special Acts and Resolves.

NOTES TO DECISIONS

- I. General Consideration.
- II. Presumptive Sentencing.

I. GENERAL CONSIDERATION.

Limited use of both suspended jail time and probation is permitted under AS 12.55.155. *Lacquement v. State, Ct. App. Op. No. 85 (File No. 5741), 644 P.2d 856 (1982).* See also *Friedberg v. State, Ct. App. Op. No. 258 (File No. 7015), 663 P.2d 558 (1983).*

Probationary sentences. — Although a probationary sentence may properly be used when a first offender is convicted of a class C felony involving sexual abuse of a child, such a sentence will be appropriate only if mitigating circumstances exist and the offender is a promising candidate for rehabilitation through probationary supervision. *State v. Coats, Ct. App. Op. No. 291 (File No. 7102), 669 P.2d 1329 (1983).*

Under former law where statutory

mitigating factors warrant a sentence of 90 days to three years, extraordinary circumstances might justify a sentence of straight probation. *State v. Brinkley, Ct. App. Op. No. 361 (File No. A-164), P.2d (1984).*

Placement of offenders. — It is within the sentencing judge's authority to make a recommendation to the commissioner regarding the appropriate placement of the offender. Under AS 33.30.100, the commissioner has the power to effectuate such a recommendation by placing the offender in the appropriate facility, and although the commissioner is not bound by the sentencing court's recommendation, a demonstrated failure to provide an appropriate rehabilitation program or to further the purposes of the sentence may justify judicial intervention. *Neil v. State, Ct. App. Op. No. 77 (File No. 5565), 642 P.2d 1361 (1982).*

Incarceration re section (g). — Under subsection (g) of this section, a convicted felon; he required to order to place him on probation for his placement in as a condition of su. App. Op. No. 77 (File No. 1361 (1982)).

For cases concerning 12.55.050, imposing sentence for persons convicted felony, see *Bowie v. State, Ct. App. Op. No. 1422, 769 (File No. 1422), State v. Carlson, Su. Ct. App. Op. No. 2908, 2913 (File Nos. 2908, 2913 Davis v. State, Sup. Ct. App. Op. No. 2698), 566 P.2d 636 (1982); State, Sup. Ct. Op. No. 3424, 580 P.2d 700 (1982); State, Sup. Ct. Op. No. 3348, 593 P.2d 257 (1982); State, Sup. Ct. Op. No. 4416, 621 P.2d 869 (1982); 454 U.S. 1090, 102 S. Ct. 2628 (1981); *Sheakley v. State, Ct. App. Op. No. 87 (File No. 49 (1982)).**

Sentence upheld. *State, Ct. App. Op. No. 627 P.2d 657 (1981); Hoover v. State, Ct. App. Op. No. 6223, 641 P.2d 100 (1982) (first-degree murder); App. Op. No. 190 (File No. 577 (1982) (sex); *Nukapigak v. State, Ct. App. Op. No. 5820, 645 P.2d 100 (1982) (first-degree murder); App. Op. No. 205 (File No. 585 (1983) (second-degree murder); *Hodges v. State, Ct. App. Op. No. 7330, 660 P.2d 100 (1983) (first-degree sexual assault); State, Ct. App. Op. No. 669 P.2d 961 (1983) (first-degree sexual assault).***

Sentence not upheld. *State, Ct. App. Op. No. 669 P.2d 961 (1983) (first-degree sexual assault of two-year-old son was excessive and case was resentencing not to be granted); *Langton v. State, Ct. App. Op. No. 7188, 6247, 7114 (1983).**

Suspended five-year sentence. *State, Ct. App. Op. No. 669 P.2d 961 (1983) (first-degree sexual assault of four-year-old son was excessive and case was resentencing not to be granted); *Langton v. State, Ct. App. Op. No. 7188, 6247, 7114 (1983).**

TO: BETTYE
FROM: SANDRA
DATE: FEB. 18, 1985

SB 72 (ABOOD) AND SB 98 (GOVERNOR) BOTH STIFFEN CRIMINAL LAW TO EXPAND THE WAYS OF GETTING INTO THE PRESUMPTIVE SENTENCING MODE. A PRESUMPTIVE SENTENCE IS FOR A MANDATORY PERIOD OF TIME ESTABLISHED IN LAW; IN OTHER WORDS, THE JUDGE HAS NO DISCRETION TO CONSIDER EXTENUATING CIRCUMSTANCES AND SENTENCE ACCORDINGLY. UNDER CURRENT STATUTE, A SECOND FELONY CONVICTION MEANS PRESUMPTIVE SENTENCING. HOWEVER, A CONVICTION THAT IS EITHER SUSPENDED OR PARDONED DOESN'T COUNT.

UNDER SB 72, SUSPENDED SENTENCES WOULD COUNT AS A PRIOR CONVICTION. UNDER SB 98, BOTH SUSPENDED SENTENCES AND PARDONS WOULD COUNT UNDER CERTAIN CONDITIONS, AND AS A FACTOR IN AGGRAVATION AND LICENSING AS WELL AS PRESUMPTIVE SENTENCING.

SB 72 WOULD ALSO ALLOW THE COURT TO ORDER A DEFENDANT TO PAY COURT COSTS.

CONCERNS:

1. CONSTITUTION GUARANTEES A RIGHT TO A JURY TRIAL. KNOWING YOU MIGHT BE CHARGED WITH PAYING NOT ONLY YOUR ATTORNEY'S FEES, BUT COSTS OF PROSECUTION AND COURT COSTS AS WELL, MAY BE A DISINCENTIVE. ARE WE INFRINGING ON CITIZENS' CONSTITUTIONAL RIGHTS?
2. HOW WOULD COSTS OF PROSECUTING AND COURT COSTS BE DETERMINED?
3. SUSPENDED IMPOSITIONS OF SENTENCE ARE GRANTED ONLY UNDER UNIQUE CIRCUMSTANCES, AND EXPUNGED FROM YOUR RECORD ONLY ONCE PROBATION IS COMPLETED. SHOULD THEY BE MADE TO CARRY THE WEIGHT OF A PRIOR CONVICTION? THIS IS THE POLICY QUESTION.
4. HOW WILL INCREASED PRESUMPTIVE SENTENCING BURDEN OUR CORRECTIONS

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 19, 1985

SUBJECT: Constitutionality of SB 72

TO: Senator Bettye Fahrenkamp
 Senate HESS

FROM: George W. Edwards *BWE*
 Legislative Counsel

This memo is in response to your request for an opinion regarding the constitutionality of SB 72.

Any statute that requires convicted criminal defendants to pay costs is subject to the argument that it discourages those charged from freely exercising their right to a full defense at trial. The argument can be made on constitutional grounds in terms of economic discrimination or a chilling effect upon the fundamental right to trial.

To my knowledge this issue has not come before the Alaska courts. Alaska Criminal Rule 39 does currently provide for payment by some criminal defendants of the costs of appointed defense counsel.

Federal law at 28 U.S.C. 1918(b) provides: "Whenever any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution."

Such assessments have been upheld against constitutional challenge in a large body of cases, see Fuller v. Oregon, 417 US 40, 40 LEd2d 642, 94 S CT.2116 (1974) and U.S. v. American Theater Corp. 526 F2nd 48 (CA 8, 1975).

The essential requirement for a statute of this type is that it not invite use against indigent defendants, see U.S. v. Gering, 716 F 2d 615 (CA 9, 1983). The exception for

Senator Fahrenkamp
February 19, 1985
page 2

indigents contained within SB 72 is intended to state this requirement.

GWE:csh
c3/009

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST:

Bill/Resolution No.: SB 72
 Title: "An Act relating to sentencing"
 Sponsor: Senator Mitch Abood
 Requestor: Senate HESS
 Date of Request: February 14, 1985

FISCAL DETAIL:

Agency Affected: DEPARTMENT OF CORRECTIONS
 Program Category Affected: Administration of Justice
 BRU, Program or Subprogram(s) Affected: Offender Confinement, Reformation and Supervision

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL	*	*	*	*	*	*
----------------	---	---	---	---	---	---

REVENUE	*	*	*	*	*	*
----------------	---	---	---	---	---	---

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	*	*	*	*	*	*

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary.

Allowing a conviction previously set aside to be considered as a prior conviction at sentencing would create some fiscal impact. This impact should be negligible; however, no statistical data is available for an accurate analysis.

Prepared By: Robert Brauer *Robert Brauer*
 Division: Administration and Support

Phone: 465-3376
 Date: February 19, 1985

Approved by Commissioner: Roger E. Endell *Roger E. Endell*
 Agency: DEPARTMENT OF CORRECTIONS

Date: February 19, 1985

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency (ies)

MURDER I = ^{MIN} 20 YRS ^{MAX} 99 YRS

MURDER II, KIDNAP + MICS I = 5 yrs 99 yrs PRESUMPTIVE SENTENCING TODAY

<u>Current Offense</u>	<u>First Felony Offender</u>	<u>Second Felony Offender</u>	<u>Third Felony Offender</u>
Sexual Assault or Sexual Abuse of a Minor in the First Degree	4 (8) 30 5 (10*) 30	7 1/2 (15) 30	12 1/2 (25) 30
Class A Felony	2 1/2 (5) 20 3 1/2 (7**) 20	5 (10) 20	7 1/2 (15) 20
Class B Felony	0 (2***) 10 0 - 10	0 (4) 10	3 (6) 10
Class C Felony	1/2 (1***) 5 0 - 5	0 (2) 5	1 1/2 (3) 5

* Ten year presumptive term only applies in cases where the defendant possesses a firearm, uses a dangerous instrument, or causes serious physical injury during the offense. All other cases are subject to the eight year presumptive term.

** Seven year presumptive term only applies if crime is a class A felony other than manslaughter and the defendant possesses a firearm, uses a dangerous instrument, causes serious physical injury or knowingly directed the conduct constituting the offense at a uniformed or otherwise identified peace or correctional officer, fire fighter, ambulance attendant, or other emergency responder engaged in official duties. All other cases are subject to the five year presumptive term.

*** Presumptive term of imprisonment only applies if defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise identified peace or correctional officer, fire fighter, ambulance attendant, or other emergency responder engaged in official duties. All other cases are not subject to presumptive sentencing and the defendant faces a maximum term of imprisonment of ten years for a class B felony and five years for a class C felony.

CHART "D"

2/14/84

CRIMINAL OFFENSES BY CLASS
REFERENCE LIST

UNCLASSIFIED CRIMES

MURDER I
MURDER II
KIDNAPPING
MISCONDUCT INVOLVING A CONTROLLED SUBSTANCE I
SEXUAL ASSAULT I
SEXUAL ABUSE OF A MINOR I

A FELONY

ATTEMPT TO COMMIT AN UNCLASSIFIED CRIME
SOLICITATION TO COMMIT AN UNCLASSIFIED CRIME
MANSLAUGHTER
ASSAULT I
ROBBERY I
ARSON I
ESCAPE I
PROMOTE PROSTITUTION I
MISCONDUCT INVOLVING CONTROLLED SUBSTANCES II

B FELONY

ATTEMPT TO COMMIT AN A-FELONY
SOLICITATION TO COMMIT AN A-FELONY
ASSAULT II
SEXUAL ASSAULT II
SEXUAL ABUSE OF A MINOR II
UNLAWFUL EXPLOITATION
ROBBERY II
EXTORTION
THEFT I
ISSUING BAD CHECK - \$25,000 OR OVER
BURGLARY I
ARSON II
CRIMINAL MISCHIEF I
FORGERY I
SCHEME TO DEFRAUD
DEFRAUD CREDITOR - MORE THEN \$25,000
BRIBERY
RECEIVING A BRIBE
PERJURY
ESCAPE II
INTERFER WITH OFFICIAL PROCEEDINGS
RECEIVE BRIBE
MISCONDUCT INVOLVING CONTROLLED SUBSTANCES III
POSSESSION OF ARTIFICIAL SUBSTANCES WITH INTENT

C FELONY

ATTEMPT TO COMMIT A B-FELONY
SOLICITATION TO COMMIT A B-FELONY
CRIMINALLY NEGLIGENT HOMICIDE
ASSAULT III
CUSTODIAL INTERFERENCE I
SEXUAL ASSAULT III
SEXUAL ABUSE OF A MINOR III
INCEST
COERCION
THEFT II
CONCEALMENT OF MERCHANDISE - FIREARM OR VALUE \$500 OR GREATER
REMOVAL OF ID MARKS - FIREARM OR VALUE \$500 OR GREATER
UNLAWFUL POSSESSION - FIREARM OR VALUE \$500 OR GREATER
ISSUING BAD CHECK - \$500 TO \$25,000
FRAUDULENT USE OF CREDIT CARD - VALUE \$500 OR GREATER
OBTAINING A CREDIT CARD FRAUDULENTLY - VALUE \$500 OR GREATER
BURGLARY II
CRIMINAL MISCHIEF II
CRIMINAL MISCHIEF III (IF PREVIOUSLY CONVICTED OF STEALING A VEHICLE)
FORGERY II
CRIMINAL POSSESSION OF FORGERY DEVICE
CRIMINAL SIMULATION - VALUE \$500 OR GREATER
FALSE INSTRUMENT FOR RECORDING
MISAPPLICATION OF PROPERTY - VALUE \$500 OR GREATER
FALSIFICATION OF BUSINESS RECORDS
COMMERCIAL BRIBE RECEIVING
COMMERCIAL BRIBERY
DEFRAUD CREDITOR - VALUE \$500 TO \$25,000
ENDANGERING A MINOR
PERJURY - INCONSISTENT STATEMENTS
ESCAPE III
PERMIT ESCAPE
PROMOTE CONTRABAND I
TAMPERING WITH WITNESS I
JURY TAMPERING
MISCONDUCT BY JUROR
TAMPERING WITH PHYSICAL EVIDENCE
HARMING POLICE DOG I
HINDERING PROSECUTION I
TERRORISTIC THREATS
RIOT
DISTURBANCES
MISCONDUCT WITH WEAPONS I
FURNISHING OF EXPLOSIVES
POSSESSION OF EXPLOSIVES - VARIES WITH INTENT
PROMOTE PROSTITUTION II
PROMOTE GAMBLING I
POSSESSION GAMBLING RECORDS I
MISCONDUCT INVOLVING CONTROLLED SUBSTANCES IV
MANUFACTURE ARTIFICIAL DRUGS
POSSESS ARTIFICIAL DRUGS WITH INTENT TO SELL

A MISDEMEANOR

ATTEMPT TO COMMIT A C-FELONY
SOLICITATION TO COMMIT A C-FELONY
ASSAULT IV
RECKLESS ENDANGERMENT
CUSTODIAL INTERFERENCE II
SEXUAL ABUSE OF A MINOR IV
INDECENT EXPOSURE BEFORE A PERSON < 16 YEARS OLD
THEFT III
CONCEALMENT OF MERCHANDISE - \$50 TO \$500
REMOVAL OF ID MARKS - \$50 TO \$500
UNLAWFUL POSSESSION - \$50 TO \$500
ISSUING BAD CHECK - \$50 TO \$500
FRAUDULENT USE OF CREDIT CARD - \$50 TO \$500
OBTAINING A CREDIT CARD FRAUDULENTLY - \$50 TO \$500
CRIMINAL TRESPASS I
CRIMINALLY NEGLIGENT BURNING
FAILURE TO REPORT A DANGEROUS FIRE
CRIMINAL MISCHIEF III
FORGERY III
CRIMINAL SIMULATION - VALUE \$50 TO \$500
OBTAIN SIGNATURE BY DECEPTION
CRIMINAL IMPERSONATION
FALSE INSTRUMENT FOR RECORDING
MISAPPLICATION OF PROPERTY - VALUE LESS THAN \$500
DECEPTIVE BUSINESS PRACTICES
MISREPRESENTED USE OF VEHICLE
CRIMINAL NONSUPPORT
CONTRIBUTING TO DELIQUENCY OF MINOR
UNLAWFUL MARRYING
RECEIVING UNLAWFUL GRATUITIES
UNSWORN FALSIFICATION
ESCAPE IV
UNLAWFUL EVASION
PROMOTING CONTRABAND II
TAMPERING WITH JUROR II
SIMULATING LEGAL PROCESS
RESISTING ARREST
HARM POLICE DOG II
COMPOUNDING
FALSE REPORT
TAMPERING WITH PUBLIC RECORDS
OFFICIAL MISCONDUCT
MISUSE OF CONFIDENTIAL INFORMATION
MISCONDUCT INVOLVING A CORPSE
CRUELTY TO ANIMALS
MISCONDUCT WITH WEAPONS II
POSSESSION OF BURGLARY TOOLS
PROMOTE PROSTITUTION III
PROMOTE GAMBLING II
POSSESSION GAMBLING RECORDS II
POSSESS GAMBLING DEVICE
MISCONDUCT INVOLVING CONTROLLED SUBSTANCES V

B MISDEMEANOR

ATTEMPT TO COMMIT AN A OR B MISDEMEANOR
SOLICITATION TO COMMIT AN A OR B MISDEMEANOR
INDECENT EXPOSURE BEFORE A PERSON 16 YEARS OLD OR OLDER
THEFT IV
CONCEALMENT OF MERCHANDISE - <\$50
REMOVAL OF ID MARKS - <\$50
UNLAWFUL POSSESSION - <\$50
ISSUING BAD CHECK - <\$50
FRAUDULENT USE OF CREDIT CARD - <\$50
CRIMINAL TRESPASS II
CRIMINAL MISCHIEF IV
CRIMINAL SIMULATION - VALUE < \$50
UNLAWFUL EVASION II
HINDERING PROSECUTION II
IMPERSONATING A PUBLIC SERVANT
DISORDERLY CONDUCT
HARRASSMENT
FIGHTING ANIMALS - 2ND AND GREATER OFFENSE
OBSTRUCTION OF HIGHWAYS
MISCONDUCT WITH WEAPONS III
PROSTITUTION
MISCONDUCT INVOLVING CONTROLLED SUBSTANCES VI
INTERFER WITH CONSTITUTIONAL RIGHTS

VIOLATIONS

FAILURE TO PERMIT VISIT WITH MINOR
REFUSE TO ASSIST OFFICER
FIGHTING ANIMALS - 1ST OFFENSE
MISCONDUCT INVOLVING CONTROLLED SUBSTANCES VII
TOBACCO TO MINORS



RECORDS CERTIFICATION



I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

10/31/89
Date

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Edin

Senate Health, Education and Social Services Committee

Legislation Checklist

Bill number: SB 80

Sponsor: Governor

Date referred to committee: 1/22/85

Synopsis completed: 1/28

Fiscal note:

Further referrals:

CONTACTS:

Dean Guaneli, Criminal Division, DOL, 3428

Dina Fake, Public Defender 279-7541

Karla Forsythe, Court System 264-0634

unlike
see
5/27 →

~~Rob Henry~~, DMS Director, Mental Health; Developmental Disabilities
James Oates, Rep DIR 3030 3370

COMMITTEE REPORT
SENATE

FURTHER: JUDICIARY
FINANCE

1/22/85

Date 4-7-85

Mr. President

The Committee on HESS considered SB 80

number of psychiatrists or psychologist appointed to examine a criminal defendant; efd.

and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass
- do pass with attached amendment(s)
- replace with/or adopt CS for SB 80
- new title
- same title and recommends DO PASS
- and attached a "LETTER OF INTENT" NEW FISCAL NOTE
- reports it back without recommendation
- recommends referral to _____ Committee

MEMBERS SIGNING
DO PASS

Joe No. 1111

Joe Joseph 1111

Scott Finch

MEMBERS HAVING
OTHER RECOMMENDATIONS

Chairman _____

Chairman recommendation _____

POSITION PAPER

SENATE BILL 80

Eddie
Ed

"An Act relating to the number of psychiatrists or psychologists appointed to examine a criminal defendant; and providing for an effective date."

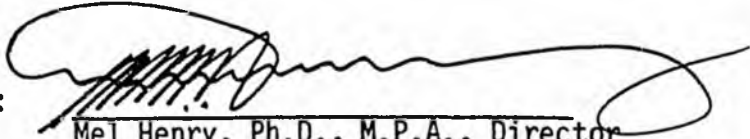
In October, 1982, Chapter 143, SLA 1982 became effective. That Act, among other things, revised Alaska's criminal laws relating to insanity and competency to stand trial. One revision that was contained in the Act requires that two psychiatrists or two forensic psychologists must be appointed to examine defendants under A.S. 12.47.070. Prior to the 1982 revision only one psychiatrist was required by statute to perform these examinations. The amendment proposed in Senate Bill 80 would give the court the option of appointing only one psychiatrist or forensic psychologist if the requirement under A.S. 12.47.070 that two psychiatrists or forensic psychologists examine the defendant is waived by both the defendant and the prosecuting attorney.

We believe that many, if not most, of these examinations can be adequately performed by utilizing only one psychiatrist or forensic psychologist. A large percentage of these exams are currently being done by the Forensic Services Team from Alaska Psychiatric Institute. The exams are performed in the Anchorage area correctional centers. If the court is required to routinely appoint two psychiatrists or forensic psychologists to examine these defendants, and Alaska Psychiatric Institute is ordered to perform the exam, a second psychiatrist that has in-hospital responsibilities must be detailed to the correctional center in order to perform the second psychiatric examination.

According to the staff at Alaska Psychiatric Institute, approximately 170 defendants per year are ordered by the courts to undergo psychiatric examinations by the Forensic Services Team. Of those that are referred to the Forensic Team, approximately 30 specifically require two psychiatrists to perform the same psychiatric examination. After completing the first psychiatric examination by the Forensic Team, if the second psychiatric examination is deemed to be unnecessary or would needlessly duplicate the findings of the first examination, the court is notified. In about half of these cases, the court agrees to limit the number of psychiatric examinations to one rather than two conducting the examinations as specified in A.S. 12.47.070. Basically, what is currently happening in practice is what is being proposed in Senate Bill 80. The amendment will simply codify the existing practice.

It is our position that this practice of routinely appointing two psychiatrists or forensic psychologists to examine criminal defendants oftentimes an unnecessary duplication of effort that can be avoided by passage of Senate Bill 80. Accordingly, the Department of Health and Social Services supports the passage of this bill.

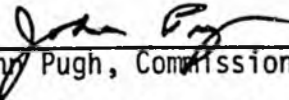
Recommended by:


Mel Henry, Ph.D., M.P.A., Director

Date:

1-28-85

Approved by:


John Pugh, Commissioner

Date:

1/30/85


Jim Auler, DHSB

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date: _____

REQUEST

Bill/Resolution No.: SB 80
 Title: An Act relating to the number of psychiatrists appointed
 Sponsor: Rules Committee
 Requestor: Governor
 Date of Request: January 28, 1985

FISCAL DETAIL

Department of Health
 Agency Affected: and Social Services
 Program Category Affected: DIVISION of Mental Health and Developmental Disabilities & API
 BRU, Program or Subprogram(s) Affected: Mental Health Institutions and Administration

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING		0				
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

See Attached

Prepared By: James L. Scoles
 Division: Mental Health & Developmental Disabilities

Phone: 465-3370
 Date: 1-28-85

Approved by Commissioner: [Signature]
 Agency: Health & Social Services

Date: 1/30/85 JCC

Distribution (by Agency preparing fiscal note):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

7/1/84

The Division of Mental Health and Developmental Disabilities does not foresee any decrease in our personnel services expenditures as a result of the passage of Senate Bill 80. In those cases in which the defendant and the prosecuting attorney waive the requirement that two psychiatrists perform the examination, the second Alaska Psychiatric Institute psychiatrist will simply continue with his in-house treatment responsibilities for mentally ill patients at the hospital. It should, however, result in the addition of more direct treatment services being available inside Alaska Psychiatric Institute as a result of the reduction in staff time by the second psychiatrist that is currently necessary to perform these court-ordered exams in the correctional centers.



Eddie FYI file

Alaska Court System
State of Alaska

OFFICE OF ADMINISTRATIVE DIRECTOR

KARLA L. FORSYTH :
General Counsel

303 K Street
Anchorage, AK 99501

February 19, 1985

Senator Bettye Fahrenkamp
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Senator Fahrenkamp:

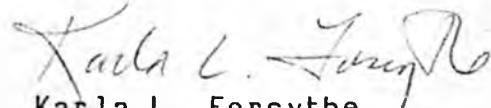
I am writing to bring to your attention a concern about SB 80, an act relating to the number of psychologists and psychiatrists appointed to examine a criminal defendant.

Under existing law there are two statutes which deal with appointment of a psychologist or psychiatrist when the defendant's competency is an issue: AS 12.47.070(a), which requires the appointment of at least two psychologists or psychiatrists, and AS 12.47.100, which requires the appointment of only one psychiatrist. I checked with David Mannheimer, assistant attorney general, office of special prosecutions and appeals, and with Dean Guaneli in the chief prosecutor's office. It was their informal opinion that these two statutes address the same situation, and therefore are in conflict.

Senate Bill 80 amends AS 12.47.070(a) to provide for appointment of only one psychiatrist or psychologist if the prosecution and defense consent. This amendment would not resolve the conflict between the two statutes. It is the view of the Alaska Court System that AS 12.47.070(a) should be amended to conform to the language of AS 12.47.100, providing for appointment of only one psychiatrist or psychologist, since there appears to be no reason why these statutes provide for a different number of psychiatrists or psychologists, and since appointment of one psychiatrist or psychologist will be less costly to the state.

Thank you for the opportunity to submit these comments.
Please let me know if I can provide additional information.

Sincerely,



Karla L. Forsythe
General Counsel

KLF:smh

cc: Arthur H. Snowden, II
Dean Guaneli
David Mannheimer

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

BILL SHEFFIELD, GOVERNOR

REPLY TO:

OFFICE OF THE CHIEF PROSECUTOR
POUCH KC
JUNEAU, ALASKA 99811
PHONE: (907) 465-3428

OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

February 20, 1985

Ms. Edie Russell
Office of Senator Fahrenkamp
Alaska State Legislature
Pouch V
Juneau, AK 99811

Re: Senate Bill 80

Dear Ms. Russell:

This letter is in response to your request for a "position paper" from the Department of Law on Senate Bill 80, relating to the number of psychiatrists appointed to examine criminal defendants.

As explained in the Governor's transmittal letter to the legislature, under AS 12.47.070(a) the court is required to appoint at least two psychiatrists or psychologists if a defendant has filed notice of intent to rely on the defense of insanity or notice of intent to rely on evidence tending to negate a culpable mental state, if there is reason to doubt the defendant's fitness to proceed, or if there is reason to believe that a mental disease or defect of the defendant will otherwise become an issue in the case. The waiver of the second psychiatrist, authorized by this bill, would avoid unnecessary duplication in cases in which both the prosecution and defense are satisfied with the appointment of a single psychiatrist. This waiver will be helpful in making efficient use of state resources, particularly where two state psychiatrists from the Alaska Psychiatric Institute would be appointed to perform the examinations.

Experience has shown that the requirement to appoint two psychiatrists is not always necessary, either to assist the court or to protect the public or the defendant. Experience has also shown that simply reducing this requirement to only one psychiatrist or psychologist would tend to weaken protection of the public because appointment of a prosecution expert would not be assured. This bill, based on that experience, seeks to achieve the most equitable result.

At your request, I have also attached a proposed committee substitute for SB 80 to address concerns raised by

the court system about overlapping and inconsistent provisions for psychiatrist examinations in AS 12.47.070 and 100. The conforming amendment which I have proposed repeals and reenacts AS 12.47.100(b), and makes it clear that the court must appoint two psychiatrists, whether the issue is insanity under AS 12.47.010, diminished capacity under AS 12.47.020, or incompetency under AS 12.47.100. The amendment also makes the procedures for conducting psychiatric examinations in insanity cases under AS 12.47.070 applicable to incompetency proceedings.

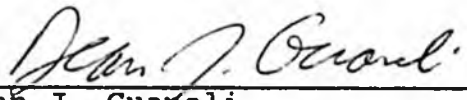
If I can be of further assistance, please contact me.

Very truly yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

DANIEL W. HICKEY
CHIEF PROSECUTOR

By:



Dean J. Guaneli
Assistant Attorney General

DJG/so-88

Attachment

SB 80

Alaska State Legislature

BETTYE FAHRENKAMP, Chairman
ARLISS STURGULEWSKI, Vice Chairman
JOE JOSEPHSON
PAUL FISCHER
EDNA ARMSTRONG-DE VRIES



POUCH V
STATE CAPITAL
JUNEAU, ALASKA 99811
(907) 465-3334
(907) 465-3635

Senate Committee on Health, Education and Social Services

MEMORANDUM

TO: Members, Senate Committee on Health, Education and Social Services

FROM: Committee Staff

RE: Committee Meeting, April 9, 1985

DATE: April 8, 1985

On Tuesday, April 9, at 1:30 pm in the Beltz Room, the Senate Committee on Health, Education and Social Services will hear the following bills:

SB 80, Relating to the number of psychologists appointed to examine a criminal defendant.

AS 12.47.070(a) requires that the court appoint two psychiatrists or forensic psychologists to examine and report upon the mental condition of a defendant if insanity is going to be relied on as defense or there is reason to believe that it will become an issue in the case. SB 80 amends AS 12.47.070(a) by allowing the option of one psychiatrist or forensic psychologist to be appointed if the defendant and prosecuting attorney both agree to it. The revision is intended to save time and money without disenfranchising either the defendant or the public.

A draft committee substitute has been prepared which would extend this procedure to incompetency proceedings. It would clarify that the court must appoint two psychiatrists to examine the defendant if there is reason to believe the person is incompetent to proceed with the trial unless the defendant and prosecuting attorney agree to a single appointment.

FEB 13 1985

PAUL E. TURNER, PH.D.
CLINICAL PSYCHOLOGIST
694 POPLAR CIRCLE
KENAI, ALASKA 99611
(907) 283-7015

*Edie - draft
response. Put
in bill file.*

February 5, 1985

FEB 12 1985

Harry Treager
Director
Division of Occupational Licensing
Pouch D
Juneau, Ak. 99811

Re: SB 80

Dear Mr. Treager:

Thank you for forwarding information to me regarding this bill and offering me the opportunity to comment on it.

I am in support of the amendment to this bill. I feel this small change will result in a substantial savings of time and financial resources to the defendant or the state. It is not always necessary to have two opinions in proceeding with a case.

I would also urge consideration of the following.

"...the court shall appoint at least two qualified psychiatrists or two qualified [forensic] psychologists [certified by the American Board of Forensic Psychology] to examine and report upon the mental condition of the defendant."

Sincerely,

Paul Turner, PhD
Paul E. Turner, Ph.D.
Clinical Psychologist

DEAN GUANELI, AG'S OFFICE, POINTED OUT AN INCONSISTENCY BETWEEN 12.47.070(a) AND 12.47.100(b). HE WILL SEND PROPOSED WORDING TO BE CONSIDERED BY THE OFFICE BEFORE IT GOES BEFORE THE COMMITTEE.

12.47.100 deals strictly with incompetency to proceed with the trial. If the prosecutor or defense attorney has a reason to believe that the accused is unable to understand the proceedings or assist in his own defense, a motion can be filed for a judicial determination of the mental competency of the accused. The court can have at least one qualified psychiatrist examine the accused.

Section 12,47.070(a) says that if a defendant:

- 1) has filed a notice of intention to rely on the affirmative defense of insanity; or,
 - 2) has filed a notice under AS 12.47.020(a); or,
 - 3) there is reason to doubt the defendant's fitness to proceed...
- the court shall appoint at least either two psychiatrists or two forensic psychologists.

IN BOTH SECTIONS OF THE CHAPTER, DEFENDANTS FITNESS TO PROCEED IS SUFFICIENT REASON FOR THE COURT TO REQUEST AN EXAMINATION; HOWEVER, ONE SECTION REQUIRES AT LEAST TWO AND THE OTHER REQUIRES AT LEAST ONE.

→ incompetency to stand trial (1)
vs. not guilty by reason of insanity (2)

Revisor's notes. — Subsection (e) was enacted as (f). Renumbered in 1982 when the original (e) was renumbered as AS 12.47.055.

Effect of amendments. — The 1984 amendment substituted "Corrections" for

"Health and Social Services" in the first and last sentences in subsection (b) and "corrections" for "health and social services" in the introductory language of subsection (e).

Sec. 12.47.055. Treatment for other defendants not limited. Nothing in AS 12.47.050 limits the discretion of the court to recommend, or of the Department of Corrections to provide, psychiatrically indicated treatment for a defendant who is not adjudged guilty but mentally ill. (§ 22 ch 143 SLA 1982; am E.O. No. 55, § 5 (1984))

Revisor's notes. — Enacted as AS 12.47.050(e). Renumbered in 1982.

Effect of amendments. — The 1984

amendment substituted "Corrections" for "Health and Social Services."

Sec. 12.47.060. Post conviction determination of mental illness. (a) In a prosecution for a crime when the affirmative defense of insanity is not raised and when evidence of mental disease or defect of the defendant is not admitted at trial under AS 12.47.020, and the defendant is convicted of a crime, the defendant, the prosecuting attorney, or the court on its own motion may raise the issue of whether the defendant is guilty but mentally ill. A hearing must be held on this issue at or before the sentencing hearing. At the hearing the court shall determine whether the defendant has been shown to be guilty but mentally ill by a preponderance of the evidence presented at the hearing and any evidence relevant to the issue that was presented at trial.

(b) If the court finds that a defendant is guilty but mentally ill, it shall sentence the defendant as provided by law and shall enter the finding of guilty but mentally ill as part of the judgment.

(c) A defendant determined to be guilty but mentally ill under this section is subject to the provisions of AS 12.47.050.

(d) In this section, "guilty but mentally ill" has the meaning given in AS 12.47.030. (§ 22 ch 143 SLA 1982)

Sec. 12.47.070. Psychiatric examination. (a) If a defendant has filed a notice of intention to rely on the affirmative defense of insanity under AS 12.47.010 or has filed notice under AS 12.47.020(a), or there is reason to doubt the defendant's fitness to proceed, or there is reason to believe that a mental disease or defect of the defendant will otherwise become an issue in the case, the court shall appoint at least two qualified psychiatrists or two forensic psychologists certified by the American Board of Forensic Psychology to examine and report upon the mental condition of the defendant. If the court appoints psychiatrists, the psychiatrists may select psychologists to provide assistance. If the defendant has filed notice under AS 12.47.090(a), the report shall consider whether the defendant can still be committed under AS

reports to the court on the mental condition of a person committed under this section.

(i) An order entered under (c) or (e) of this section may be reviewed by the court of appeals on appeal brought by either the defendant or the state within 40 days from the entry of the order.

(j) In this section,

(1) "dangerous" means a determination involving both the magnitude of the risk that the defendant will commit an act threatening the public peace or safety, as well as the magnitude of the harm that could be expected to result from this conduct; a finding that a defendant is "dangerous" may result from a great risk of relatively slight harm to persons or property, or may result from a relatively slight risk of substantial harm to persons or property;

(2) "mental illness" means any mental condition that increases the propensity of the defendant to be dangerous to the public peace or safety; however, it is not required that the mental illness be sufficient to exclude criminal responsibility under AS 12.47.010, or that the mental illness presently suffered by the defendant be the same one the defendant suffered at the time of the criminal conduct. (§ 22 ch 143 SLA 1982)

NOTES TO DECISIONS

Prior statute construed. — See Clark v. State, Ct. App. Op. No. 96 (File No. 5658), 645 P.2d 1236 (1982), decided under former AS 12.45.090.

Cited in Blackburn v. State, Ct. App. Op. No. 243 (File No. 7224), 661 P.2d 1100 (1983).

Sec. 12.47.100. Incompetency to proceed. (a) A defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against the defendant or to assist in the defendant's own defense may not be tried, convicted, or sentenced for the commission of a crime so long as the incapacity exists.

(b) When, after arrest and before the imposition of sentence or before the expiration of any period of probation, the attorney general, the prosecuting attorney, or the attorney for the accused has reasonable cause to believe that a person charged with a crime may be presently suffering from a mental disease or defect or is otherwise so mentally incompetent that the accused is unable to understand the proceedings or to properly assist in the accused's own defense, the attorney general, prosecuting attorney, or the attorney for the accused may file a motion for a judicial determination of the mental competency of the accused. Upon that motion or upon a similar motion on behalf of the accused, or upon its own motion, the court shall have the accused, whether or not previously admitted to bail, examined by at least one qualified psychiatrist, who shall report to the court concerning the mental condition of the accused. For the purpose of the examination the court may order

Revisor's notes. — Subsection (e) was enacted as (f). Renumbered in 1982 when the original (e) was renumbered as AS 12.47.055.

Effect of amendments. — The 1984 amendment substituted "Corrections" for

"Health and Social Services" in the first and last sentences in subsection (b) and "corrections" for "health and social services" in the introductory language of subsection (e).

Sec. 12.47.055. Treatment for other defendants not limited. Nothing in AS 12.47.050 limits the discretion of the court to recommend, or of the Department of Corrections to provide, psychiatrically indicated treatment for a defendant who is not adjudged guilty but mentally ill. (§ 22 ch 143 SLA 1982; am E.O. No. 55, § 5 (1984))

Revisor's notes. — Enacted as AS 12.47.050(e). Renumbered in 1982.

Effect of amendments. — The 1984

amendment substituted "Corrections" for "Health and Social Services."

Sec. 12.47.060. Post conviction determination of mental illness. (a) In a prosecution for a crime when the affirmative defense of insanity is not raised and when evidence of mental disease or defect of the defendant is not admitted at trial under AS 12.47.020, and the defendant is convicted of a crime, the defendant, the prosecuting attorney, or the court on its own motion may raise the issue of whether the defendant is guilty but mentally ill. A hearing must be held on this issue at or before the sentencing hearing. At the hearing the court shall determine whether the defendant has been shown to be guilty but mentally ill by a preponderance of the evidence presented at the hearing and any evidence relevant to the issue that was presented at trial.

(b) If the court finds that a defendant is guilty but mentally ill, it shall sentence the defendant as provided by law and shall enter the finding of guilty but mentally ill as part of the judgment.

(c) A defendant determined to be guilty but mentally ill under this section is subject to the provisions of AS 12.47.050.

(d) In this section, "guilty but mentally ill" has the meaning given in AS 12.47.030. (§ 22 ch 143 SLA 1982)

Sec. 12.47.070. Psychiatric examination. (a) If a defendant has filed a notice of intention to rely on the affirmative defense of insanity under AS 12.47.010 or has filed notice under AS 12.47.020(a), or there is reason to doubt the defendant's fitness to proceed, or there is reason to believe that a mental disease or defect of the defendant will otherwise become an issue in the case, the court shall appoint at least two qualified psychiatrists or two forensic psychologists certified by the American Board of Forensic Psychology to examine and report upon the mental condition of the defendant. If the court appoints psychiatrists, the psychiatrists may select psychologists to provide assistance. If the defendant has filed notice under AS 12.47.090(a), the report shall consider whether the defendant can still be committed under AS

Services" in the first in subsection (b) and health and social secretary language of sub-

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a defendant has efense of insanity 7.020(a), or there or there is reason e defendant will l appoint at least ts certified by the and report upon ppoints psychia- rovide assistance.), the report shall nitted under AS

12.47.090(c). The court may order the defendant to be committed to a secure facility for the purpose of the examination for not more than 60 days or such longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

(b) In an examination under (a) of this section, any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.

(c) The report of an examination under (a) of this section shall include the following:

(1) a description of the nature of the examination;

(2) a diagnosis of the mental condition of the defendant;

(3) if the defendant suffers from a mental disease or defect, an opinion as to the defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's defense;

(4) if a notice of intention to rely on the affirmative defense of insanity under AS 12.47.010(b) has been filed, an opinion as to the extent, if any, to which the capacity of the defendant to appreciate the nature and quality of the defendant's conduct was impaired at the time of the crime charged; and

(5) if notice has been filed under AS 12.47.020(a), an opinion as to the capacity of the defendant to have a culpable mental state which is an element of the crime charged.

(d) If the examination under (a) of this section cannot be conducted by reason of the unwillingness of the defendant to participate in it, the report shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental disease or defect.

(e) The report of the examination under (a) of this section shall be filed with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant. (§ 22 ch 143 SLA 1982)

NOTES TO DECISIONS

Editor's notes. — The cases annotated under Notes to Decisions were decided under former AS 12.45.087.

The conviction of a person who is incompetent to stand trial violates due process of law. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

One of the primary reasons for requiring that a defendant be competent before standing trial is to safeguard the accuracy of the guilt finding process. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

The defendant must have some minimum ability to provide his counsel with information necessary or relevant to his defense. He must also be able to understand the nature of the proceedings sufficiently to participate in certain decisions about the conduct of the defense. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Some strategic choices must be the product of meaningful communication between the defendant and his counsel. Schade v. State, Sup. Ct. Op. No. 912 (File No. 1620), 512 P.2d 907 (1973).

Sec. 12.45.155. Laboratory report of controlled substances. (a) In a prosecution under AS 11.71.010 — 11.71.070, a complete copy of an official laboratory report from the Department of Public Safety or a laboratory operated by another law enforcement agency is prima facie evidence of the content, identity, and weight of a controlled substance. The report must be signed by the person performing the analysis and must state that the substance which is the basis of the alleged offense has been weighed and analyzed. In the report, the author shall state with specificity findings as to the content, weight, and identity of the substance.

(b) A sworn statement prepared by the author of the report provided for in (a) of this section must be attached to the report. The statement must set out the identity of the author and include a statement that the author is an employee of the laboratory issuing the report and that performing the analysis is a part of the author's regular duties. The statement must also include an outline of the author's education, training, and experience for performing an analysis. The author shall state that scientifically accepted tests were performed with due caution, and whether to the author's knowledge the evidence was handled in accordance with established and accepted procedures while in the custody of the laboratory.

(c) The prosecuting attorney shall serve a copy of the report on the attorney of record for the accused, or on the defendant if the defendant has no attorney, not later than 20 days before a proceeding in which the report is to be used against the accused. However, at a preliminary hearing or grand jury proceeding, the report may be used without having previously been served upon the accused.

(d) The accused or the accused's attorney may demand the testimony of the person signing the report, by serving a written demand showing cause upon the prosecuting attorney within seven days from receipt of the report.

(e) A report issued for use under this section must contain notice of the right of the accused to demand the testimony of the person signing the report. (§ 16 ch 45 SLA 1982)

Sec. 12.45.160. [Renumbered as AS 12.45.082.]

Chapter 47. Insanity and Competency to Stand Trial.

Section	Section
10. Insanity excluding responsibility	50. Disposition of defendant found guilty but mentally ill
20. Mental disease or defect negating culpable mental state	55. Treatment for other defendants not limited
30. Guilty but mentally ill	60. Post conviction determination of mental illness
40. Form of verdict when evidence of mental disease or defect admissible	70. Psychiatric examination

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Section

- 80. Procedure upon verdict of not guilty
- 90. Procedure after raising defense of insanity
- 100. Incompetency to proceed
- 110. Commitment on finding of incompetency

Section

- 120. Determination of sanity after commitment
- 130. Definitions

Sec. 12.47.010. Insanity excluding responsibility. (a) In a prosecution for a crime, it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct.

(b) The affirmative defense defined in (a) of this section may not be raised at trial unless the defendant, within 10 days of entering a plea or such later time as the court may for good cause permit, files a written notice of intent to rely on the defense.

(c) Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the affirmative defense under (a) of this section.

(d) The affirmative defense specified in (a) of this section is the affirmative defense of insanity. A defendant who successfully raises the affirmative defense of insanity shall be found not guilty by reason of insanity and the verdict shall so state. (§ 22 ch 143 SLA 1982)

NOTES TO DECISIONS

Former law construed. — See Smith v. State, Sup. Ct. Op. No. 2121 (File No. 4228), 614 P.2d 300 (1980); Walunga v. State, Sup. Ct. Op. No. 2142 (File No. 4746), 630 P.2d 527 (1980); Nielson v. State, Sup. Ct. Op. No. 2279 (File No. 4857), 623 P.2d 304 (1981); Evans v. State, Sup. Ct. Op. No. 2505 (File No. 4086), 645 P.2d 155 (1982) (these cases were decided under former AS 12.45.083).

Sec. 12.47.020. Mental disease or defect negating culpable mental state. (a) Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a culpable mental state which is an element of the crime. However, evidence of mental disease or defect that tends to negate a culpable mental state is not admissible unless the defendant, within 10 days of entering a plea, or at such later time as the court may for good cause permit, files a written notice of intent to rely on that defense.

(b) When the trier of fact finds that all other elements of the crime have been proved but, as a result of mental disease or defect, there is a reasonable doubt as to the existence of a culpable mental state that is an element of the crime, it shall enter a verdict of not guilty by reason of insanity. A defendant acquitted under this subsection, and not found guilty of a lesser included offense, shall automatically be considered to have established the affirmative defense of insanity

under AS 12.47.010. The defendant is then subject to the provisions of AS 12.47.090.

(c) If a verdict of not guilty by reason of insanity is reached under (b) of this section, the trier of fact shall also consider whether the defendant is guilty of any lesser included offense. If the defendant is convicted of a lesser included offense, the defendant shall be sentenced for that offense and shall automatically be considered guilty but mentally ill under AS 12.47.030 and 12.47.050. Upon completion of a sentence for a lesser included offense, a hearing shall be held under AS 12.47.090(c) to determine the necessity of further commitment of the defendant, based on the acquittal for the greater charge under (b) of this section. If the defendant is committed under AS 12.47.090(c), the defendant is subject to the provisions of AS 12.47.090(d) — (j). (§ 22 ch 143 SLA 1982)

NOTES TO DECISIONS

Effect of section. — Former AS 12.45.085 merely made evidence of mental illness excluding responsibility inadmissible in evidence in the absence of written

notice of intent to rely on that defense. *Christie v. State*, Sup. Ct. Op. No. 644 (File No. 2841), 580 P.2d 310 (1978).

Collateral references. — 21 Am. Jur. 2d, Criminal Law, §§ 40-128, 154.
 22 C.J.S., Criminal Law, §§ 55-64.
 Modern status of M'Naghten test of criminal responsibility, 45 ALR2d 1447.
 Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 ALR3d 146.
 Mental or emotional condition as dis-

minishing responsibility for crime, 22 ALR3d 1228.
 XYY syndrome as affecting criminal responsibility, 42 ALR3d 1414.
 Amnesia as affecting capacity to commit crime or stand trial, 46 ALR3d 544.
 Admissibility on issue of sanity of expert opinion based partly on medical, psychological or hospital reports, 55 ALR3d 551.

Sec. 12.47.030. Guilty but mentally ill. (a) A defendant is guilty but mentally ill if, when the defendant engaged in the criminal conduct, the defendant lacked, as a result of a mental disease or defect, the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of law. A defendant found guilty but mentally ill is not relieved of criminal responsibility for criminal conduct and is subject to the provisions of AS 12.47.050.

(b) Evidence of a mental disease or defect that is manifested only by repeated criminal or antisocial conduct is not sufficient to establish that the defendant was guilty but mentally ill under (a) of this section. (§ 22 ch 143 SLA 1982; am § 43 ch 6 SLA 1984)

Effect of amendments. — The 1984 amendment substituted "that the defen-

dant was guilty but mentally ill" for "the defense" in subsection (b).

REQUEST

Bill/Resolution No.: SB 80
 Title: "...the number of psychiatrists...to examine a crim. defendant."
 Sponsor: Senate Rules/Governor
 Requestor: Governor's Ofc./OMB
 Date of Request: 12/18/84

FISCAL DETAIL

Agency Affected: Department of Law
 Program Category Affected: Administration of Justice
 BRU, Program or Subprogram(s) Affected: Prosecution

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

This bill would allow a criminal defendant and the prosecuting attorney to waive the requirement that the court appoint two qualified psychiatrists or forensic psychologists to examine certain defendants. If that requirement is waived, the court would only have to appoint one psychiatrist or psychologist, saving considerable expense on the part of the Division of Mental Health and Developmental Disabilities. This bill will not have a fiscal impact on the Department of Law's Operations.

Prepared By: Richard I. Pegues, Director

Phone: 465-3672

Division: Administrative Services

Date: 12/19/84

Approved by Commissioner: Richard I. Pegues / FOR
Norman C. Gorsuch

Date: 12/19/84

Agency: Department of Law

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

7/1/84

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY
LEGISLATIVE REFERENCE LIBRARY

May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

HESS

4-9-85

1:36pm



STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 22, 1985

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that allows a criminal defendant and prosecuting attorney to waive the requirement that the court appoint two qualified psychiatrists or forensic psychologists to examine certain criminal defendants. If that requirement is waived, the court would only have to appoint one such psychiatrist or psychologist.

Under present law (AS 12.47.070(a)), if a defendant has filed notice of intent to rely on the defense of insanity or notice of intent to rely on evidence tending to negate a culpable mental state; if there is reason to doubt the defendant's fitness to proceed; or if there is reason to believe that a mental disease or defect of the defendant will otherwise become an issue in the case, the court is required to appoint at least two psychiatrists or psychologists to examine the defendant. The waiver authorized by this bill would avoid unnecessary duplication in cases in which the prosecution is satisfied with the appointment of a single psychiatrist, and the defendant does not wish to undergo more than one court-ordered examination. This waiver will be especially helpful in cases in which two state psychiatrists from the Alaska Psychiatric Institute would be appointed to perform the examinations.

Experience has shown that the requirement to appoint two psychiatrists is not always necessary, either to assist the court or to protect the public or the defendant. Experience has also shown that simply reducing this requirement to only one psychiatrist or psychologist would tend to weaken protection of the public since appointment of a prosecution expert would not be assured. This bill, based on that experience, seeks to achieve the most equitable result.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill Sheffield".

Bill Sheffield
Governor

received Senate HESS approval

9/9/85

ALL DO PASS

Offered: 4/11/85
Referred: Judiciary

Original sponsor: Rules/Governor

passed Senate 2/6/86 20-0

BY THE HEALTH, EDUCATION AND
SOCIAL SERVICES COMMITTEE

1 IN THE SENATE

2

CS FOR SENATE BILL NO. 80 (HESS)

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

FOURTEENTH LEGISLATURE - FIRST SESSION

5

A BILL

6 For an Act entitled: "An Act relating to the number of psychiatrists or

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psychologists appointed to examine a criminal defen-

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dant; and providing for an effective date."

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

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* Section 1. AS 12.47.070(a) is amended to read:

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(a) If a defendant has filed a notice of intention to rely on

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the affirmative defense of insanity under AS 12.47.010 or has filed

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notice under AS 12.47.020(a), or there is reason to doubt the defen-

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dant's fitness to proceed, or there is reason to believe that a mental

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disease or defect of the defendant will otherwise become an issue in

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the case, the court shall appoint at least two qualified psychiatrists

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or two forensic psychologists certified by the American Board of

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Forensic Psychology to examine and report upon the mental condition of

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the defendant. However, if both the defendant and the prosecuting

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attorney waive the requirement for the appointment of at least two

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psychiatrists or psychologists, the court shall appoint one psychia-

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trist or psychologist. If the court appoints a psychiatrist [PSYCHIA-

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TRISTS], the psychiatrist [PSYCHIATRISTS] may select a psychologist

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[PSYCHOLOGISTS] to provide assistance. If the defendant has filed

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notice under AS 12.47.090(a), the report shall consider whether the

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defendant can still be committed under AS 12.47.090(c). The court may

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order the defendant to be committed to a secure facility for the

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purpose of the examination for not more than 60 days or such longer

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period as the court determines to be necessary for the purpose and may

Received
22 AT 00 JJA
28/11/11

1 direct that a qualified psychiatrist retained by the defendant be
2 permitted to witness and participate in the examination.

3 * Sec. 2. AS 12.47.100(b) is amended to read:

4 (b) When, after arrest and before the imposition of sentence or
5 before the expiration of any period of probation, the attorney gener-
6 al, the prosecuting attorney, or the attorney for the accused has
7 reasonable cause to believe that a person charged with a crime may be
8 presently suffering from a mental disease or defect or is otherwise so
9 mentally incompetent that the accused is unable to understand the
10 proceedings or to properly assist in the accused's own defense, the
11 attorney general, prosecuting attorney, or the attorney for the
12 accused may file a motion for a judicial determination of the mental
13 competency of the accused. Upon that motion or upon a similar motion
14 on behalf of the accused, or upon its own motion, the court shall
15 appoint at least two qualified psychiatrists to examine and report
16 upon the mental condition of the defendant. However, if both the
17 defendant and the prosecuting attorney waive the requirement for the
18 appointment of at least two psychiatrists, the court shall appoint one
19 psychiatrist [HAVE THE ACCUSED, WHETHER OR NOT PREVIOUSLY ADMITTED TO
20 BAIL, EXAMINED BY AT LEAST ONE QUALIFIED PSYCHIATRIST, WHO SHALL
21 REPORT TO THE COURT CONCERNING THE MENTAL CONDITION OF THE ACCUSED].
22 For the purpose of the examination the court may order the accused
23 committed for a reasonable period as the court may determine to a
24 suitable hospital or other facility to be designated by the court. If
25 the report of the psychiatrist indicates a state of present mental
26 disease or defect or of other mental incompetency in the accused, the
27 court shall hold a hearing, upon due notice, at which evidence as to
28 the mental condition of the accused may be submitted, including that
29 of the reporting psychiatrist, and make a finding with respect to the

1 mental condition of the accused. No statement made by the accused in
2 the course of an examination into the mental competency of the accused
3 provided for by this section, whether the examination is with or
4 without the consent of the accused, may be admitted in evidence
5 against the accused on the issue of guilt in a criminal proceeding
6 unless the accused later relies on a defense under AS 12.47.010 or
7 12.47.020. A finding by the judge that the accused is mentally compe-
8 tent to stand trial in no way prejudices the accused in a defense
9 based on insanity; the finding may not be introduced in evidence on
10 that issue or otherwise be brought to the notice of the jury.

11 * Sec. 3. This Act takes effect immediately in accordance with AS 01.-
12 10.070(c).